FILE COPY.

FILED
FEB 8 1906
JAMES H. MCKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. [redacted]17

HENRY RANDALL WEBB, EXECUTOR OF MARIANNE A. B. KENNEDY, APPELLANT,

vs.

CAROLINE KING.

BRIEF OF APPELLANT.

R. ROSS PERRY,
R. ROSS PERRY, JR.,
E. S. THEALL,
Counsel for Appellant Webb.

LAW REPORTER PRINTING CO., WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 203.

HENRY RANDALL WEBB, EXECUTOR OF MARIANNE A. B. KENNEDY, APPELLANT,

vs.

CAROLINE KING.

BRIEF OF APPELLANT.

Concise Statement of the Case.

This is an appeal from a final decree rendered by the Court of Appeals of the District of Columbia on the 8th day of March, 1905. (Rec. p. 492.)

On the 4th day of December, 1901, the appellee, Caroline King, filed her original bill in equity in the Supreme Court of the District of Columbia against Marianne A. B. Kennedy, Myer Cohen, Sigmund Kann, and Louis Kann, defendants. This bill, filed by the complainant as tenant of the defendant Kennedy, sought relief from a forfeiture of a lease of premises No. 715 Market Space, in the city of Washington, District of Columbia (Rec. pp. 1–13). It is sufficient to summarize the contents of the pleadings as follows:

The complainant claimed that her husband, Henry King, Jr., on July 8, 1890, leased from the defendant Kennedy the said premises for a term of three years

from the 1st day of October, 1890, and that said lease was, by sundry agreements between the parties thereto, extended until the the 1st day of October, 1908; that her husband died on the 15th of August, 1897; that on the 26th day of the same August the said lease was for a valuable consideration assigned to her by her husband's administrator c. t. a., which assignment was consented to by the defendant Kennedy; that in the said lease, among other conditions, was one which provided that all taxes should be paid by the tenant, under penalty of a forfeiture of the said lease in the event of non-payment; that her assignor, Henry King, Jr., and herself, performed all the covenants on his part in said lease contained, save that she omitted to pay the instalment of taxes due upon the demised property for the second half of the fiscal year ending June 30, 1898; that this omission was accidental, and occasioned in part by mental anxiety and distress in consequence of the death of her husband and of the embarrassed condition of his affairs; that on the 13th day of April, 1899, the premises were attempted to be sold on account of the failure to pay the said taxes, and were bought by one C. H. Wiltsie, of Rochester, N. Y., for the sum of one hundred and forty-three dollars and eighty-three cents ($143.83), the property at that time being worth not less than fifty thousand ($50,000) dollars; that the omission to pay said taxes and the consequent sale and the issuing of the certificate therefor were unknown to the complainant until the month of July, 1901; that at said last named time the said Wiltsie informed her that he held this certificate and was willing to sell the same, but demanded an excessive price; that thereupon negotiations ensued between Wiltsie and her son, which were pending in September, 1901; that in said September, Henry Randall Webb, then the attorney and agent of the defendant Kennedy, learned of said default, sale, and certificate; that thereupon certain interviews and nego-

tiations ensued between the said Webb and Kennedy and the defendants Cohen and Sigmund and Louis Kann, as the result whereof the defendant Kennedy determined to forfeit the said lease by reason of the said non-payment of taxes and the consequent sale, and to rent the said premises to the defendants Kann at an advance of twelve hundred ($1,200) dollars per year; further, that the defendants Kann authorized said Cohen to purchase the tax title from the said Wiltsie and to hold it for their purposes in connection with enforcing the forfeiture and securing a lease; that the defendant Cohen informed Webb that he was going to buy the tax title and hold it at arm's length; and thereupon, with the acquiescence of the said Webb, proceeded to Rochester, N. Y., where the said Wiltsie lived, and bought the said tax title from him, taking an assignment of the certificate; that at this very time the certificate had been sent by Wiltsie to a Washington bank in order that the complainant might purchase it, and that she would have made this purchase at once had she known of the intended purchase by the defendants Kann; that the purchase by the defendants Kann was collusive between them and the said Kennedy and Webb, and was made only in furtherance of the common design of forfeiture and the giving possession of the demised premises to the defendants Kann; that the movements of said Cohen to Rochester and back to Washington were very expeditious, and that in two days he had made the purchase and converted the tax certificate into a tax deed; that on the last day of September, 1901, the complainant tendered her monthly instalment of rent to the defendant Kennedy in ignorance of the said projected forfeiture, and received notice that the forfeiture would be enforced; that thereupon the complainant sent to the bank in question, intending to take up the said certificate, but found that it had been returned to Rochester; that she subsequently learned that

the defendant Cohen had bought the said certificate and taken the tax title in his own name ; that on the 4th day of October, 1901, she endeavored to purchase from the said Cohen the said tax title, offering him a liberal price therefor, but that he refused; that during the same month of October she endeavored to procure from the defendant Kennedy permission to use her name in litigation for the purpose of annulling the said tax title, offering to indemnify her, but was refused such permission; that thereafter the defendant Kennedy, upon the advice of her physician and friend, Dr. Fry, determined to waive the said forfeiture and reinstate the lease; that when the defendants Kann learned of this change of intention they notified the defendant Kennedy that she must either give them the lease, as agreed upon, or defend her property against the tax title which they held; that thereafter, on the 9th day of November, 1901, the defendant Kennedy, in consequence of this threat, entered landlord and tenant proceedings against the complainant for the possession of the demised premises; that the said alleged tax sale is absolutely void by reason of certain defects therein, which are set out in detail; that the defendants Cohen and Kann knew of the invalidity of the said tax sale when they bought the said certificate.

The prayer of the bill is for relief from the forfeiture and for injunction against landlord and tenant proceedings and for an adjudication of the invalidity of the said tax sale and an injunction against the defendant Cohen and the defendants Kann from setting up the same.

As has been said, this original bill was filed on December 4, 1901, and on the same day a restraining order, as prayed in the bill, was issued (Rec. p. 25).

On the same day the defendant, Marianne A. B. Kennedy, died, and on the 7th of March, 1902, a bill of revivor was filed (Rec. pp. 26–29). This bill of revivor, after reciting the purpose of the original bill and the

proceedings had thereupon, averred the death of Mrs. Kennedy and set forth the contents of her last will, substantially to the effect that all of her property was devised to Henry Randall Webb, in trust to sell the same and out of the proceeds thereof to pay certain legacies, amounting to about $40,000; that the said property very largely exceeds in value the amount of the said legacies and that there will remain a large surplus descending to Maria Gillis Dewey as sole heir at law and next of kin of the testatrix; that Henry Randall Webb has qualified as executor of said will, and has signified his intention of dispossessing the complainant from the premises described in the original bill; that process may be issued against said Webb and Dewey, making them parties to the proceedings, and that the said Webb may be enjoined from attempting to dispossess the complainant.

On the 4th of April, 1902, a supplemental bill was filed by the complainant, the only material averment of which is that the defendant Webb has actually instituted landlord and tenant proceedings against her to oust her from the premises in controversy (Rec. pp. 29–31). The supplemental bill prays specifically that the defendant Webb may be enjoined from proceeding with the landlord and tenant suit.

On the 4th day of April, 1902, the defendant Webb was restrained, as prayed in the supplemental bill, until the further order of the court (Rec. p. 33). The injunction undertaking will be found at page 34 of the record, and is signed by the plaintiff and her son, Harry King.

Answers to the original bill, the bill of revivor, and the supplemental bill were filed as follows:

By the defendant Dewey, on April 15, 1902 (Rec. p. 35).

By the defendant Myer Cohen, on the 18th day of April, 1902 (Rec. pp. 36–54).

By the defendants Sigmund and Louis Kann, on April 18, 1902 (Rec. pp. 63–74).

By the defendant Webb, on April 18, 1902 (Rec. pp. 77–85).

The answer of the defendant Dewey is merely formal and admits that she is the heir at law, but denies that she is the next of kin, of the said Kennedy. The answers of the defendants Cohen, Sigmund, and Louis Kann, and Webb, in so far as it is necessary to state them here, are to the effect that none of them knew anything of the default made by the plaintiff in the payment of taxes in question until the times next hereinafter stated; that about the 19th or 20th of September, 1901, one Knight notified one of the Kanns of the tax sale, and that he thereupon spoke of the same on the next day to the defendant Cohen; that Kann referred Knight to Webb as attorney for the owner, Mrs. Kennedy; that on the afternoon of September 25, 1901, Knight informed Webb that the property had been sold for taxes and that the tax sale was invalid, and wished Webb to employ him to cancel the said sale; that on the next day Webb consulted the records and found that the tax sale was irredeemable, and also found that the property had been on another occasion sold for taxes and redeemed by the complainant in May, 1901; that thereupon Webb advised his client of the situation and of her legal rights in the premises; that on September 30, 1901, Webb called upon Cohen, he being then attorney for the Kanns, and inquired whether or not they were still willing to pay $300 a month rent for the premises in question, as they had offered to do some months before; that on the same day Cohen informed Webb that the Kanns would lease said premises on the terms stated, provided they were given possession thereof and their said offer was not used as a means to compel the complainant to pay higher rent; that Mrs. Kennedy, upon having this fact communicated to her, determined to forfeit the lease and to give a new lease to the Kanns; that on the same day, in the afternoon, Webb

was informed by Cohen that he (Cohen) was going to Rochester to purchase the tax certificate in question from the holder thereof, one Wiltsie; that Webb endeavored to dissuade him therefrom, but without success; that thereupon Cohen went to Rochester the same night, purchased the said certificate from Wiltsie, returned at once to Washington, and had the proper authority execute to him a deed of the tax sale in question; that when Cohen reached Rochester he learned for the first time that negotiations had been pending for some (8) weeks between the complainant and Wiltsie for the sale of the tax title in question to her; that there was no collusion between Webb and Cohen and the Kanns, or between Webb and any of them in this purchase; that a little later, through the intervention of Mrs. Kennedy's friend and physician, she wavered as to her course and determined to waive the forfeiture, provided the complainant would extinguish the tax title and secure her; that subsequently the defendants, the Kanns and Cohen, through their counsel, represented to Mrs. Kennedy that she would either have to give them a lease for the sum agreed upon, to-wit, $3,600 a year and taxes, in which event they would cancel the tax title in her favor, or if she gave a new lease to the complainant she would have to fight the tax title; that thereupon, the complainant having failed to secure her, Mrs. Kennedy determined to adhere to the declaration of forfeiture, and authorized the landlord and tenant proceedings to recover possession of the premises. These answers were supported by affidavits, the averments of which it is not material to refer to here.

The cause came on for a preliminary hearing on the bills and the answers thereto, and on the 28th of June, 1902, Clabaugh, C. J., granted an injunction *pendente lite*. (Rec. p. 106.) On July 2, 1902, the defendant Webb prayed a special appeal to the Court of Appeals of the District of Columbia from said order. (Rec. p. 108.)

This appeal constituted cause No. 1241 upon the docket of that court and was heard in December, 1902. On January 20, 1903, the opinion of the court was delivered by Mr. Justice Morris, and will be found reported in 21 App. D. C., pp. 141–153.

Thereupon the cause was remanded to the Supreme Court of the District of Columbia, and testimony was taken, beginning on the 20th day of February, 1903, and concluding on the 8th day of June, 1904. The cause came on for final hearing upon the pleadings, and all of the testimony and exhibits, in June, 1904, and on the 30th day of that month the final decree was made by Anderson, J., whereby the tax sale in question was decreed to be null and void, and the defendants Cohen and the Kanns were permanently enjoined from asserting the same; the defendants Webb and Dewey were enjoined from enforcing any forfeiture by reason of the said sale upon the payment into the registry of the court of the amount of taxes, in default of payment whereof the said sale was made; the plaintiff was decreed to pay one-half of the costs, and the defendants Cohen and the Kanns were decreed to pay the remaining half (Rec. pp. 480–484).

From so much of this decree as affected them, the defendants Cohen and the Kanns separately appealed; from so much of it as affected the defendant Webb, he, severing from his co-defendant Dewey, appealed (Rec. p. 482).

This appeal was heard in the Court of Appeals of the District of Columbia, in February, 1905 (Rec. p. 487), and on March 8, 1905, that court delivered its opinion (Rec. pp. 487–491), affirming the decree of the lower court in the premises (see, also, 25, App. D. C. p. 182). The decree of affirmance was entered the same day (Rec. p. 492).

From this final decree the appellant Webb duly appealed to this court, had his appeal allowed, and filed

his supersedeas bond which was duly approved (Rec. pp. 492–495). The cause comes on now in this court to be heard upon that appeal.

The questions involved are:

1st. Do the pleadings and the testimony establish such a case as entitle the complainant to relief in a court of equity against an admitted forfeiture of a lease by breach of a covenant on the part of the lessee (complainant), to pay all taxes accruing during the demised term?

2nd. Is such breach one that can be compensated to a landlord?

3d. Must the landlord in such case make any demand upon the tenant before declaring a forfeiture, and, if so, for what?

4th. Where the tenant has covenanted to pay all accruing taxes upon the demised premises, what, if any, duty rests upon the landlord, as between the tenant and himself, to keep watch upon the tenant's possible defaults and to avoid their consequences?

5th. Do the acts of the landlord, in herself paying these taxes (she collecting them from the tenant) down to a certain date, relieve the tenant from her covenant to pay taxes subsequently accruing?

6th. What diligence must a complainant use who applies to a court of equity for relief against a forfeiture declared by the landlord on account of such a breach?

7th. Where the tenant has not only allowed the demised premises to be sold for taxes, but has continued his breach until a tax deed for the demised premises has issued to an assignee of the purchaser, can the tenant litigate the question of the validity of that tax sale with the holder of the tax title at the risk of the landlord?

8th. Is not a bill in equity which attempts to enjoin the enforcement of a forfeiture declared by the landlord

by reason of such a breach, and also to adjudicate the validity of such tax sale, multifarious?

9th. Was not the lease in question procured under such circumstances (disclosed by the evidence) as will induce a court of equity to look unfavorably upon it?

10th. Do the pleadings and the evidence disclose any case of fraud on the part of the defendant, or of accident or mistake on the part of the complainant, which would constitute a ground of equitable relief?

11th. Has not the complainant been guilty of such laches as disentitle her to relief?

12th. In any case can a defaulting tenant have relief from a forfeiture save on the condition of paying all costs and reasonable counsel fees to the landlord incurred in resisting such relief?

Specification or Assignment of the Errors Relied Upon by Appellant.

1. The Court of Appeals erred in determining each of the twelve foregoing questions (each of which is hereby repeated as a specification and assignment of error) adversely to the contentions of the appellant.

2. That court erred in not reversing the decree of the Supreme Court of the District of Columbia in the premises, and in not dismissing the original bill and the bill of revivor and the supplemental bill, upon the ground that the said bills and the testimony taken in support thereof did not establish such a case as a court of equity should relieve.

3. That court erred in granting a permanent injunction against the defendant Webb upon the pleadings and testimony in said cause.

4. That court erred in holding that the case estab-

lished by the said bills and the testimony taken in support thereof entitled the plaintiff to equitable relief.

5. That court erred in holding that the averments of the said bills, and the testimony taken in support thereof, established such a case of surprise or mistake or inadvertence on the part of the complainant as a court of equity should relieve.

6. That court erred in holding that any acts of the defendants or any of them, as set forth in the said bills and the testimony taken in support thereof, constituted a ground of equitable relief in favor of the complainant.

7. That court erred in holding that the complainant was not guilty of such laches in the premises as barred in a court of equity any claim on her part for equitable relief in the premises.

8. That court erred in holding that the said bills were not multifarious.

9. That court erred in not requiring the plaintiff to pay the whole costs of the case and also reasonable sums to the defendant Webb, as compensation for sums paid by him as counsel fees and also for printing briefs and other necessary expenses.

BRIEF OF THE ARGUMENT.

The lease in question is as follows (Rec. pp. 13–15):

> "This indenture made this eighth day of July in the year of our Lord eighteen hundred and ninety, between Marianne A. B. Kennedy of the city of Washington in the District of Columbia, of the first part, and Henry King Jr. of the same place, of the second part, witnesseth.
>
> "That for and in consideration of the rents and covenants hereinafter reserved and contained, the

said party of the first part has let and demised, and by these premises does let and demise, unto the said party of the second part, that certain messuage, situate on Market space, that is to say, on the north side of Louisiana avenue, between Seventh and Eighth streets, northwest, in the aforesaid city of Washington, and numbered '715,' together with all and singular the store fixtures and other fixtures now in and about said messuage and belonging or pertaining thereto, as the property of the said party of the first part, and together, also, with the ground on which said messuage stands and all its appurtenances thereto belonging, or in anywise appertaining, for a term of *three years* from and next after the first day of October, eighteen hundred and ninety, upon the following and upon each of the following conditions, that is to say, upon condition—

"First. That the rent hereinafter reserved and every instalment thereof, shall be punctually and promptly paid to the said party of the first part and her assigns in the manner and at the time or times hereinafter mentioned for the payment thereof.

"Secondly. Upon condition that, during the continuance of the aforesaid term, the said party of the second part, his executors, administrators or assigns, shall and will use and occupy the store part or portion of said messuage as, and only as, a fancy or dry-goods store, and the remaining part or portion of said messuage, either as and for a dwelling-house or as and for offices.

"Thirdly. Upon condition that the said party of the second part his executors, administrators or assigns, shall not, during the continuance of the aforesaid term, either assign or sublet the said demised premises or any part thereof, without first obtaining the consent in writing, of the said party of the first part to such assignment or sublease.

"Fourthly. Upon condition that, during the continuance of the aforesaid term, the said party of the second part, his executors, administrators or assigns, shall and will, at his or their cost and

expense, keep the said demised premises and every part thereof, in good repair and condition, excepting only such repairs as may be rendered necessary by accidental fire.

"Fifthly. Upon condition that the said party of the second part, his executors, administrators, or assigns, will, during the continuance and until the end and determination of the said term for which the said premises are demised, *pay or cause to be paid in each and every year thereof*, the taxes, general and special, of every character and description, assessed against and levied upon the said premises by the authorities of the general or local government.

"Sixthly. Upon condition that, at the expiration or other sooner determination of the aforesaid term, the said party of the second part, his executors, administrators, or assigns, shall and will peaceably and quietly yield up and surrender to the said party of the first part, her heirs or assigns, the said demised premises and every part thereof, in good condition and repair, excepting only reasonable wear and tear and such repairs as may be rendered necessary by accidental fire as aforesaid; and,

"Seventhly. Upon condition that, during the continuance of the aforesaid term, the said party of the second part, his executors or assigns, shall and will pay to the said party of the first part, an annual rent of twenty-four hundred dollars ($2400.) for the aforesaid demised premises, in and by equal monthly instalments of two hundred dollars ($200.) each, on the last day of each and every month during the continuance of the aforesaid term, and subject to the aforegoing conditions, and each of them,

"To have and to hold the said demised premises unto the said party of the second part for the term of three years from and next after the first day of October, 1890, as aforesaid.

"And the said party of the second part, having accepted, and now again accepting the said demised premises for the term aforesaid, upon the

conditions and every of them hereinbefore mentioned and set forth doth, by these presents, for himself, his executors, administrators, and assigns, covenant, promise, and agree to and with the said party of the first part, that he, the said party of the second part, shall and will well and truly observe, keep, obey, and perform the aforesaid conditions and every of them, according to their and its true intent and meaning; and further,

"That if he, the said party of the second part, his executors, administrators, or assigns, shall at any time or times refuse, neglect, or fail well and truly to observe, keep, and obey, and perform the aforesaid conditions and every of them, according to their or its true intent and meaning, then, at the option or election of the said party of the first part, the aforesaid term and every unexpired part thereof, shall instantly cease and determine (anything herein contained to the contrary, notwithstanding), and be thereafter utterly null and of no effect; and it shall thereupon, at her option and election, be lawful for the said party of the first part into and upon the said demised premises, and into and upon any and every part thereof, wholly to reenter and the same to have again, repossess and enjoy, as in her first and former estate, as fully as though said demise had never been made.

"In testimony whereof the said parties hereto have respectively hereunto set their hands and seals on the day and year first hereinbefore written.

"(Signed) MARIANNE A. B. KENNEDY. [SEAL.]
"(Signed) H. KING, JR. [SEAL.]

Witness:
MYER COHEN.

It will be observed that the forfeiture and reentry clause is general and applies to the breach of several conditions. This would be a material circumstance if

the question were whether or not a certain sum of money, to be paid upon the violation of these conditions, or any of them, were to be regarded as a penalty or as liquidated damages.

1 Pomeroy's Eq. Juris., secs. 441, 446.

But the principle extends no further than this, as is evident from the following authorities, cited below by counsel for the appellee in contending that the same principle applied generally :

The case of *Astley* v. *Weldon*, 2 B. & P. 346, was one in which there was a contract between a manager and an actress, containing various covenants; one to pay the actress a certain sum per week, and, also, traveling expenses ; another by the actress to perform certain acts, the violation of which was, by the regulations of the theater, subject to a small fine. It was provided that if either neglected to perform the agreement, he or she should pay to the other two hundred pounds. It was held, in accordance with the elementary rule of law, that this was a penalty and not liquidated damages, since, amongst other things, payment of several smaller sums was secured by a larger sum.

In the case of *Kemble* v. *Farren*, 6 Bing. 141, there was an agreement that a manager should, amongst other things, pay an actor a certain sum per night. It was provided that if either party should break any part of the agreement he should pay the other 100 pounds, to be liquidated damages. The defendant refused to act during the second season, and the manager brought suit. It was held that the sum mentioned was a penalty, since it, a very large sum, might become immediately payable for the non-payment of a very small sum.

In the case of *Horner* v. *Flintoff*, 9 M. & W. 680, the court held a certain sum stipulated to be paid for the

breach of a covenant to be liquidated damages, and not a penalty.

In the case of *Price* v. *Green*, 16 M. & W. 354, a stipulation to pay 5,000 pounds as liquidated damages for the breach of a covenant was held to be liquidated damages, and not penalty.

In the case of *Dakin* v. *Williams*, 17 Wendell, 448, the same thing was held; and the court says that it can not protect people from improvident bargains.

In the case of *Shreeve* v. *Brereton*, 1 P. F. Smith (Pa.), 175, a stipulation to pay $10,000 as liquidated damages for the breach of certain covenants, among which were the payments of smaller amounts of money, was held to be a penalty.

In the case of *Lampman* v. *Cochran*, 16 N. Y. 275, the same thing was held.

No discussion is required to show that the principle applied in these cases is entirely inapplicable to the case under consideration.

QUESTION I.

Do the pleadings and the testimony establish such a case as entitle the complainant to relief in a court of equity against an admitted forfeiture of a lease by breach of a covenant on the part of the lessee (complainant) to pay all taxes accruing during the demised term?

Before this question can be answered it must be ascertained in what cases courts of equity will relieve a tenant from forfeiture incurred by a breach of his covenant.

Consideration of cases involving fraud, accident, or mistake will be deferred.

Reference will be first made to English authorities.

There is printed in Appendix A to this brief an extract from the standard English treatise of Platt on Leases,

which is a historical review as well, also, as a critical consideration of the English statutes and adjudged cases on this subject. Pages 1 to 9 of this appendix discuss the relief which will be granted, both at law and in equity, from forfeiture occasioned by non-payment of rent.

This relief rests entirely upon the ground that a failure to pay rent at a day certain is compensated by a payment at a later day of that sum with interest, costs, and expenses, if any. But even here, if breaches of covenants, for which the lessee might be ejected, and against which the court could not relieve, be proved, it will not relieve against a breach for non-payment.

Bowser v. *Colby*, 1 Hare, 109, 134.
Home v. *Thompson*, Sause & Scully's Rep.

So, also, a case might exist in which a tenant might, by conduct, deprive himself of his right to redeem, although no covenant, other than for the payment of rent, might have been broken.

Bowser v. *Colby*, 1 Hare, 109, 138.

When we turn from covenants to pay rent to covenants to repair, not to assign, to pay taxes, and to insure (to mention the more important only), we are at once impressed with the difference in consequences resulting from a breach of these as contrasted with the covenant to pay rent.

Possibly the landlord may be greatly inconvenienced by the failure to receive his rent when due; but in contemplation of law such results are extraordinary, and can not be made the basis of any general rule of damages. Legal interest is generally full compensation for the mere withholding of money due.

But when you pass this line you get beyond the relief of the law, *because the law can not estimate the damage of a breach.*

Your tenant agrees to insure, but fails to do so. You find, upon inquiry at the insurance office, that you have been subject for one year to loss by fire. How can the law estimate your damage? Upon what principle can it force you to retain that tenant, and to run a risk with him again during the whole unexpired term of his lease? The covenant on his part to insure was one of the considerations which induced you to make the lease to him. The law can not deprive you of the benefit of that covenant without departing from its elemental principles. Nor can the law require you to constitute yourself his guardian and to be on the watch to anticipate and render harmless his breaches of contract by your own prudence or voluntary discharge of his obligations. Equally as serious or even more serious considerations apply to the covenant existing in the case at bar. If a man's property be sold for taxes and the period of redemption expire, his property has gone more completely than if fire had swept his house away. Is he to be told that the particular tax sale is invalid? That is not his damage. He has a dangerous tenant; the covenant to pay taxes has lost its value; he must no longer rely on his tenant, but must, under peril of a valid tax sale, disregarding the covenant, himself pay the taxes, and then recover them from his tenant; or he must be at the trouble of seeing that the tenant performs a continuing contract duty, and in default must perform it for him. For these obvious reasons the English courts have held that no court can estimate the damage which a landlord suffers from the breach of such contracts as these.

The case of *Rolfe* v. *Harris*, 2 Price 206 (220) n., involved the question of relief against a forfeiture for breach of a covenant to insure. The Vice-Chancellor (Sir Thomas Plumer) said:

> "That brings us to the third object of the bill—whether the court ought to give the relief sought

against the forfeiture, for the breach of the covenant? and that is certainly a very important question.

"By the terms of the lease, the tenant was bound to keep the premises in repair, without any exception in case of fire. Under that covenant he was an insurer to the landlord, as far as his responsibility went; but not choosing to depend on that alone, he insists on the further security of an insurance in one of the public offices. Notwithstanding the covenant, the tenant did not insure from 1807 to 1809, when the landlord gave him notice to perform the covenant; and his attention being thus called to it, he did insure for one year; but, at the expiration of that policy, he omits to renew it; and when asked whether he has insured, it appears that his answer is, not that he intended to insure, but that he had not, and would not without receiving a regular notice. Now, though he had previously been given a notice, it was more than he was entitled to; and the defendant might have ejected him without, upon the first omission, for the breach of covenant. But all notion of inadvertence was thereby excluded; and if it were not so, the covenant amounts to a condition, that the tenant shall hold no longer than whilst he insures.

"His honor then went at large into the authorities (*all of which are cited in the principal case*), from which he adduced the following principles, as the general result and effect of the decisions: That where the court will relieve, the omission and consequent forfeiture must be the effect of inevitable accident, and the injury or inconvenience arising from it must be capable of compensation; but that where the transgression is wilful, or the compensation impracticable, the court will refuse to interfere. If the latter branch of the doctrine were not established to restrain the latitude of the jurisdiction, it would be a most dangerous jurisdiction, as was well observed by Lord Eldon, who asks, what is there to govern a court

of equity in the exercise of such a discretion? The decision in *Sanders* v. *Pope* appears to have been founded rather on *dicta* than authorities, and goes further than the authorities warrant.

"*Why, in such cases as these, of relief against breach of contract, is a court of equity to be called on to make a new contract? The parties agree that, if the condition be broken, the lessor shall reenter; and the court is asked to give damages instead. What damages can the court give? And what damages would reconcile a man to a tenant who breaks his contract and brings his landlord before a court of equity by a bill, to be relieved against the effect of his own injurious neglect, and to defeat the landlord's remedy for the breach of the condition on which he holds, because he has done so? It seems to me to be a mischievous and arbitrary jurisdiction; and, if exercised at all, ought to be confined to cases of a pecuniary nature, such as non-payment of rent, and money not paid by a day certain, and where such breaches stand alone.*

"In such cases, perhaps, compensation may be made; but when the principle of compensation is applied to other cases, such as waste, and not repairing, it becomes very difficult, if not impracticable, to effect it. The only mode of measuring damages is by an issue *quantum damnificatus;* and that may turn out to be wholly unsatisfactory, and, in many instances, not capable of being carried into effect by any means, as in breaches of covenant for assigning without leave. *In this very sort of case, too, how can we, when a risk has been run, estimate the quantum of that risk in damages? This is such a breach of covenant as is out of the measurement of damages; and the effect of giving the relief prayed would be, that any tenant may hereafter break this special covenant with impunity, and every landlord must be content to take his tenant for his insurer, for want of power to enforce his covenant.* Whatever may be done, therefore, in general cases, the court

ought not to relieve in forfeiture for breaches of the covenant to insure. I should have been of the same opinion, if I were not so well borne out by authorities on this point as I find I am. Having stated the case of *Wadman and Calcraft*, and observed that the question there was distinctly whether the power to relieve was restricted to cases of non-payment of rent; and having averted to the other cases, the effect of which is to confine the jurisdiction of the court, in applications for relief against forfeiture, his honor particularly and emphatically took a view of the case of *Reynolds* v. *Pitt*, 19 Vesey, 134. That case, he observed, was precisely in point with the present in all its circumstances, and proceeded on a breach of the same covenant (for trivial distinctions should not be introduced in important cases), and that alone would be a sufficient authority for refusing the relief sought.

"Upon principle, therefore, and precedent, I am of opinion: That I am not warranted in giving the relief prayed against the forfeiture; and I think that in no part of this case ought the plaintiff to be relieved."

In the case of *White* v. *Warner*, 2 Merivale, p. 459, there was a motion for an injunction to restrain the defendant from suing at law upon the breach of a covenant to keep premises insured from fire. It was represented as a case of great hardship, the plaintiff having laid out £3,000 in repairs on the premises. Lord Eldon refused the injunction. He said that he had looked carefully into the cases, and that they did not bear out the proposition which was meant to be inferred from them, that the court will, in cases of forfeiture for breach of covenant, give relief upon the principle of compensation; that the omission to insure was stronger against the tenant than the omission to repair, because in the latter case the landlord may, by exercising due vigilance, see to the observance of the covenant; but in the former, where he

also has undertaken to keep insured, the landlord must rely upon him for the fulfilment of his obligation.

In the case of *Green* v. *Bridges*, decided in 1830, 4 Simmons (p. 96), Vice-Chancellor Shadwell had before him the case of a bill filed by a tenant for relief against the breach of a covenant to insure. This was also a case of hardship, because the tenant had spent money in improving the premises. In that case there had also been an insurance in the name of the tenant. The Vice-Chancellor said (p. 101):

> "I have a perfect recollection of the case of *Reynolds* v. *Pitt*. It was first decided in the Court of Exchequer. The same point came before the Master of the Rolls, and his decision was affirmed by the Lord Chancellor. I was counsel in the cause throughout. I remember that Lord Eldon, when he delivered his judgment, gave a minute analysis of all the cases in which a court of equity relieves against breach of covenant, and laid it down that the court would not relieve, except in cases where payment of money is a complete compensation, and will put the party in the same situation as he would have been if there had been no breach. In this case there has been a wilful breach of covenant. It is strange to say that the irregularity was caused by the neglect of the landlord in not requiring to see the policies. He could not have had notice until the breach was committed, even if he had applied to see the policies; and, therefore, his not having done so does not excuse the breach. In this case the landlord could not, by any payment of money, be put into the same situation as he was entitled to be, under the covenant. My opinion, therefore, is that the order *nisi* for dissolving the injunction must be made absolute."

In the case of *Reynolds* v. *Pitt*, 19 Vesey (p. 134), Lord Chancellor Eldon reviewed the cases of *Rolfe* v. *Harris* (*supra*); *Cage* v. *Russel*, 2 Ventr. (352); *De-*

Scarlett v. *Dennett*, 9 Mod. (22); *Hack* v. *Leonard*, 9 Mod. (91); *Gunston* v. *Lord Bruce*, 1 Salk. (p. 156); *Wafer* v. *Mocatto*, 9 Mod. (p. 112); *Rose* v. *Rose*, Amb. (p. 331); *Northcote* v. *Duke*, Amb. (p. 511); *Eaton* v. *Lyon*, 3 Ves. (p. 690); *Wadman* v. *Calcraft*, 10 Ves. (p. 67); and *Sanders* v. *Pope*, 12 Ves. (p. 282).

He then said (p. 141), referring to the case of *De-Scarlett* v. *Dennett* (*supra*):

> "There is no doubt that had there not been a right of reentry for non-performance of covenants, there might upon an action of covenant be compensation in damages, which that action necessarily supposes. The court, therefore, stating that there can be no relief against a breach which can not be estimated by damages, must have meant compensation estimated by some rule as certain as that of principal and interest, and Sir Joseph Jekyll proceeds to state that very idea in distinguishing the case of non-payment of rent: 'For there the loss is certain and may be recompensed with damages;' and, being pressed with the hardship, when the plaintiff was willing to make recompense, adds that it is 'owing to his own covenant, and to a wilful voluntary breach thereof, against which this court can not relieve.'"

At page 142, referring to the case of *Wafer* v. *Mocatto* (*supra*), Lord Eldon said:

> "*Wafer* v. *Mocatto* was the case of an assignment without license; if to a beggar, I do not know what damages the landlord is to get: but, if the lessee, a beggar, assigns to a wealthy man, and it is to be put upon damage, the landlord derives an advantage from it. The court, however, refused to relieve, saying: 'this is a forfeiture, and such a forfeiture against which this court can not relieve; because it is unknown what shall be the measure of the damages.' That is known in a sense; as, if the remedy was sought in an action of covenant, the law supposes the damage

in compensation: but the court means that relieving against the forfeiture they are to have, not the casual opinion of a jury, but, as it is expressed in some cases, some certain rule to go by."

Again, Lord Eldon says (p. 143):

"Where a man has covenanted to keep premises, demised to him, insured from fire, that the lessor may not be exposed to that evil, as the tenant can not himself reimburse him, and the effect of that contract is secured by reserving a right of entry, if the tenant has wilfully and obstinately prevented that insurance, and it has so subsisted for one, two, or three years (for where is it to stop?), upon what principle is a court of equity to say that a tenant, who has so neglected to fulfil his contract, shall insist that the landlord shall keep all the terms with him, as if he had duly performed it?"

See, also,

Gregory v. *Wilson*, 9 Hare, 683.
Nokes v. *Gibbons*, 26 L. J. Ch. 433.
Job v. *Banister*, 2 K. & J. 374.

In all of these cases Lord Eldon's rulings in *Hill* v. *Barclay* were followed, although in the case of *Job* v. *Banister*, the tenant lost £5,000 for a breach of covenant which might be amply remedied by £500.

Relief has likewise been refused if a tenant assign or underlet against his covenant without consent.

Wafer v. *Mocatto*, 9 Mod. 112.
Wadman v. *Calcraft*, 10 Ves. 67.
Hill v. *Barclay*, 18 Ves. 63.
Lovat v. *Lord Ranelagh*, 3 Ves. & B. 31.
Bracebridge v. *Buckley*, 2 Pri. 200–221.

Relief has also been refused where the lessee carried on a trade prohibited by the covenant.

Macher v. *The Foundling Hospital*, 1 Ves. & B. 188.

The only confusion that exists with respect to the general doctrine was introduced by Lord Erskine, through his decision in the case of *Sanders* v. *Pope*, 12 Ves. 282. This case, together with the cases in which it is cited and commented upon, are reviewed by Mr. Platt, with great care and judgment. This review will be found in Appendix A to this brief, pages 11 to 19. It is the conclusion of Mr. Platt that since the case of *Bracebridge* v. *Buckley*, 2 Pri. 215, Lord Erskine's decision in *Sanders* v. *Pope* is overruled, and its authority destroyed.

The case of *Bracebridge* v. *Buckley*, 2 Price, 200, is an important one, in that it reviews the prior cases hereinbefore referred to. This was a bill in equity filed for relief against a lessor's right of reentry for forfeiture by breach of a covenant to lay out a sum of money on the demised premises in repairs within a given time. Relief was refused on the ground that the court had no effectual means of ascertaining or of making compensation to the covenantee. The court held it was not enough to show that no damages had been sustained by delay in the repairing, and that the premises could have been put into as good or better condition as they would have been if the covenant had been effectually performed. The court further held that an alleged mistake of the solicitor who prepared the lease in introducing the limitation of the period for performance of the covenant, although not warranted by the previous agreement or so understood at that time by the parties themselves, but denied by the answer, could not affect their decision.

In delivering the opinion of the court, Richards, Baron, said (p. 225):

> "No doubt, the contract of these parties required that £1,000 should be laid out within a year, and I wish to know how what they contracted for can now be done. If not done within the given time, the contract is not performed. The lessor can not call on this court to compel

the lessee to perform the contract; and why should the lessee call on the lessor to forego it? . . . The court, therefore, can not give a compensation, because they have no means of ascertaining precisely what the compensation should be, or the mode of making it, when ascertained (p. 226). . . . I am of opinion, therefore, that this bill should be dismissed. Lord Erskine's decision (*Sanders* v. *Pope*) did not give satisfaction in Westminster Hall."

Graham, Baron, said (p. 230):

"I agree that a court of equity will relieve, where a complete compensation can be effectually made, and the party put *in statu quo*. But I am at a loss to understand what is meant by compensation in such a case as this. . . . If we should grant relief, we should decide that all such clauses are merely *in terrorem*, though made with care, and by skilful conveyancers (p. 231). . . . I am surprised it should be thought that a series of cases support the doctrine of relieving in such a case, for I think it will be found to be only where a compensation can be made in the way of damages; but here the money should have been laid out in repairs. All the cases refer to where the party injured is to receive damages, which could not be the case here, for a recompense in damages is not required, nor would that remove the effect of the breach of covenant."

Thompson, Chief Baron, said (p. 232):

"It really comes to a question, whether in all cases of reentry on breach of covenant, a court of equity will do away the covenant? The authorities of *Wadman* v. *Calcraft* and *Hill* v. *Barclay*, do, I think, establish what is right to be done in these cases. The first was for non-payment of rent. Ejectment was brought; and an issue was directed to ascertain if there had been any breach of the covenant to repair; clearly with a view to a decision, that if there was, that would be conclusive, and no relief would be given."

In this case Wood, Baron, dissented and supported the decision in the case of *Sanders v. Pope.*

In a note to the report of *Sanders* v. *Pope* (12 Ves. 294) the reporter says: "That the authority of the principal case has been very much shaken, see ante, note 2, to *Eaton* v. *Lyon*, 3 Ves. 690. See, also, the notes to *Williams* v. *Cheney*, 3 Ves. 59; and the note to *Wadman* v. *Calcraft*, 10 Ves. 67."

In the publication entitled "Overruled Cases" by Bigelow, this case is included under the name of "*Pope* v. *Sanders*, 12 Vesey, 282–290," and is said to have been denied in the case of *Swanton* v. *Biggs*, 2 Molloy (14–16). In this last named case, counsel in argument said: "*Pope* v. *Sanders*, 12 Ves. 290, will not be followed now." Lord Chancellor Hart said:

> "Lord Erskine was clearly mistaken in *Pope* v. *Sanders*. It is settled the other way. I think the statute (11th Ann, Chap. 2) is imperative to relieve, upon the terms required by the statute being complied with. It is an act to abridge the equity of a tenant and reduce to six months the relief which the court was in the habit of extending to him at any time, upon putting the landlord in as good a situation by payment of his rent and costs. This is the doctrine of this equity, a principle which runs through the whole doctrine of the court in respect of mortgages and forfeitures for non-payment of money to the person insisting on the forfeiture. It would not apply if the eviction had proceeded upon the other ground of waste and such breaches of covenant. In such cases the court does not relieve against forfeitures; as in the case of the house in Skinner street, in which I was counsel for the tenant, who had covenanted to insure against fire and had not insured. There the court refused to relieve, *because, although no damage actually occurred, the risk had been undergone contrary to the agreement. Reynolds* v. *Pitt*, 19 Ves. (134). I confess I thought that a hard case, an instance of a sound principle carried to the extremity of rigor."

In the English work of Woodfall on The Law of Landlord and Tenant (13th edition), the author says (p. 328):

> "The result of the modern cases appears to be that accident and surprise afford the only instances in which relief was given, and that the fact that a landlord gained ever so large an improved value by insisting on the forfeiture was not taken into account."

The statute of 22 and 23 Victoria, c. 35 (now repealed and superseded by the Conveyancing Act), gave power to a court of equity to relieve, against failure to insure, in a case where no loss had happened, and the breach had been committed without fraud or gross negligence, and there was an insurance on foot at the time of the application to the court.

Ibid, p. 328.

All considerations applicable to a failure to insure apply with augmented force to a failure to pay taxes. Fire does not destroy title; a tax sale does.

The Conveyancing Act (44 and 45 Victoria, c. 41) made material changes in preexisting law. We are not concerned with the provisions of this act here, as it can have no operation upon preexisting law.

That the foregoing cases establish what this preexisting law was, has been definitely determined by this court in the case of *Sheets* v. *Selden*, 7 Wall. 416-422. Mr. Justice Swayne, delivering the unanimous opinion of the court, says (p. 421):

> "Courts of equity are governed by the same rules in the exercise of this jurisdiction as courts of law. All arrears of rent, interest, and costs must be paid or tendered. If there be no special reason to the contrary, an injunction thereupon goes to restrain further steps to enforce the forfeiture. The grounds upon which a court of equity proceeds are, that the rent is the object of

the parties, and the forfeiture only an incident intended to secure its payment; that the measure of damages is fixed and certain, and that when the principal and interest are paid the compensation is complete. In respect to other covenants pertaining to leasehold estates, where the elements of fraud, accident, and mistake are wanting, and the measure of compensation is uncertain, equity will not interfere. It allows the forfeiture to be enforced, if such is the remedy provided by the contract. The rule is applied to the covenant to repair, to insure, and not to assign. Lord Eldon limited the relief to cases where the lease required the payment of a specific sum of money. The authorities going beyond this he held to be unsound, and declined to follow them. Speaking of *Wadman* v. *Calcraft*, he said that the Master of the Rolls in that case held 'that, though against ejectment for non-payment of rent the court would relieve upon a principle long acknowledged in this court, but utterly without foundation, it would not relieve where the right of the landlord accrued, not by non-payment of rent, but by the non-performance of covenants which might be compensated in damages.' Such is now the settled English rule upon the subject. In *Bracebridge* v. *Buckley*, Baron Wood, in a dissenting opinion, made an earnest and able assault upon this doctrine. The question may be regarded as yet unsettled in the jurisprudence of this country."

Prior to the passage of the Conveyancing Act the law was settled in England, that, save in cases of fraud, accident, and mistake, equity will not interfere when the measure of compensation is uncertain, and that measure is necessarily uncertain, save where the breach concerns a covenant to pay rent. A breach of a collateral covenant does not admit of a certain measure of compensation. A lessor contracts in view of the law. His contract right to have a collateral contract performed under

penalty of forfeiture is a right of property, and can not be taken from him, save by process of condemnation. It can no more be taken from him than his contract right to receive a given sum for goods sold and delivered.

Coming to American authorities, it is said by Mr. Story, in section 1314 of his work upon Equity Jurisprudence, that—

> "the right to redeem in equity in cases of this character is now well established; and the general principle now adopted is that, wherever a penalty is inserted merely to secure the performance or enjoyment of a collateral object, the latter is considered as the principal intent of the instrument, and the penalty is deemed only as accessory, and therefore as intended only to secure the due performance thereof, or the damage really incurred by the non-performance. In every such case the true test by which to ascertain whether relief can be had in equity is to consider whether compensation can be made or not. If it can not be made, then courts of equity will not interfere. . . .
>
> "The same doctrine has been applied by courts of equity to cases of leases where a forfeiture of the estate and an entry for the forfeiture is stipulated for in the lease, in case of the non-payment of the rent at the regular days of payment; for the right of entry is deemed to be intended to be a mere security for the payment of the rent."

Section 1323:

> "Indeed, the doctrine seems now to be asserted in England that in all cases of forfeiture for the breach of any covenant, other than a covenant to pay rent, no relief ought to be granted in equity, unless upon the ground of accident, mistake, fraud, or surprise, although the breach is capable of a just compensation; and the same rule is applied to cases where there is not only a clause for reentry in case of non-payment of rent, but also a proviso that if the rent is not duly paid the lease shall be void. . . .

"Section 1324. Be this as it may, it is clearly established that courts of equity will not interfere for the breach of covenants and conditions where there can not be any just compensation decreed for the breach. Thus, for example, in the case of a forfeiture for the breach of a covenant not to assign a lease without license, or to keep leasehold premises insured, or to renew a lease within a given time, no relief will be given; for they admit of no just compensation or clear estimate of damages."

Mr. Pomeroy, in his work upon Equity Jurisprudence, volume I, section 453, states the law as follows:

"Where a lease contains a condition that the lessor may reenter and put an end to the lessee's estate, or even that the lease shall be void upon the lessee's failure to pay the rent at the time specified, it is well settled that a court of equity will relieve the lessee and set aside a forfeiture incurred by his breach of the condition, whether the lessor has or has not entered and dispossessed the tenant. This rule is based upon the notion that such condition and forfeiture are intended merely as a security for the payment of money.

"Section 454: Equity will not, under ordinary circumstances, relieve against a forfeiture arising from the breach of other covenants contained in the lease, on the ground that no exact compensation can be made. Among these covenants, for a breach of which no relief can ordinarily be given, is that to repair generally, or to make specific repairs, or to lay out a certain sum of money in repairs or erections within a specified time; a covenant to insure; a covenant not to assign without license; and in other covenants of a special nature. It should be observed, however, that in all cases of this class relief may be given when the breach was the result of fraud, mistake, accident, surprise, and the like, or was acquiesced in or waived by the lessor."

An elaborate note is appended to the case of *Smith* v. *Mariner*, 68 Am. Dec. 73 (the note beginning at page 85), where the law is stated as follows:

> "Though it is stated that equity will always and only grant relief against a forfeiture where the condition broken was for the payment of money, this rule is certainly not absolutely correct, but is even said to be clearly incorrect. Where the act in default of which a forfeiture is to be incurred is such that its value can not be pecuniarily measured, so that compensation for the default can not be ascertained definitely or with any reasonable precision, relief against a forfeiture will not, under ordinary circumstances, be given. (Citing authorities.) And in many cases of forfeiture incurred on breach of covenants in lease, or stipulation in other agreements, courts will refuse relief, though compensation for the injury could be ascertained without difficulty, as for breach of covenants to keep insured, not to assign, for repairs, and the like. . . .
>
> (Page 86:) "Courts will refuse to aid a defaulting party or relieve against a forfeiture where the violation of the agreement occurred through gross negligence, or was wilful or persistent. . . .
>
> "Forfeitures for the breach of covenants not intended merely as a security for the payment of money will not generally be relieved against, for the reason that no exact compensation can be made. Among such are covenants to make general or specific repairs or improvements; covenants to insure; covenants not to assign without license. So as to other special covenants, such as a covenant for the personal services of a certain individual; a covenant to refrain from carrying on a particular trade; a covenant to cultivate lands in a husbandlike manner; a covenant not to suffer persons to use a private road over the land leased."

The question would appear to be directly decided by

this court in the case of *Sheets* v. *Selden*, 7 Wall., 416. At page 421 the court say:

> "Courts of equity are governed by the same rules in the exercise of this jurisdiction as courts of law. All arrears of rent, interests, and costs, must be paid or tendered. If there be no special reason to the contrary, an injunction thereupon goes to restrain further steps to enforce the forfeiture. The grounds upon which a court of equity proceeds are, that the rent is the object of the parties, and the forfeiture only an incident intended to secure its payment; that the measure of damages is fixed and certain, and that when the principal and interest are paid the compensation is complete. *In respect to other covenants pertaining to leasehold estates, where the elements of fraud, accident, and mistake are wanting, and the measure of compensation is uncertain, equity will not interfere. It allows the forfeiture to be enforced if such is the remedy provided by the contract. This rule is applied to the covenant to repair, to insure, and not to assign.*"

It has been explicitly decided that, where due payment of taxes is one of the covenants of a lease, and the taxes are allowed to become delinquent by the lessee or his assigns, no demand for their payment by the lessor is necessary before declaring a forfeiture, and that equity will not relieve against the forfeiture of a lease for breach of covenant when the breach has been culpable, long persisted in, and detrimental.

> *Bacon* v. *Park*, 19 Utah Reports, p. 46; decided in the year 1899.

The following language, used by Baskin, J., in that case, is very pertinent:

> "By the covenants of the lease of said premises, in case of default the lessor was authorized to re-enter without notice and forfeit the lease. It required no accounting to fix the amount of said

taxes. The plaintiff, by going to the treasurer's office, could have ascertained the amount; and if he intended to keep the covenants of the lease it was his duty to do so, and, when ascertained, to pay the amount, without applying to the defendant Park for such information. He knew that the premises had been sold for delinquent taxes, and that the time for redemption would soon expire, and that if the redemption was not made, that Hamilton Park's title to the premises would be defeated."

The following language of the court is also especially relevant, in view of the fact, admitted upon the face of the bills, that after the plaintiff knew not only that the property had been sold for taxes, which she had covenanted to pay, but that that sale had ripened into a deed and was irredeemable, she still, when possessed of such knowledge, wasted weeks in a negotiation with the holder of the tax title, endeavoring to obtain better terms from him:

"The plaintiff was aware of the covenants in the lease relating to forfeiture. He knew that default had been made in the payment of taxes for several years (the deficit for taxes amounting to about four thousand dollars), and that the premises had been sold for the non-payment of the same, and that the time to redeem had nearly expired; yet he did not intend to redeem until the last day. Such intention and such delay was a gross violation of the covenants of the lease. The evidence shows that Mr. Park (the owner of the premises) was in straitened circumstances. His property was in danger of being sacrificed for the non-payment of taxes. *By forfeiting the lease he ascertained that he could raise the money necessary to redeem the property by releasing the same. It would have been reckless on his part to let such an opportunity pass, and it was absurd for the plaintiff to expect that the lessor would not assert his right of forfeiture for the non-payment of taxes until the last day for*

INSERT.

After the brief and argument of the appellant Webb had been printed and filed, his counsel received in due course of publication the advance sheets No. 6 of Volume LXIX of the Lawyers' Reports Annotated. At page 833 will be found a note covering the whole subject of forfeiture, to which counsel respectfully refer the court. They desire to especially call the attention of the court to the case of Gordon *vs.* Richardson, 185 Mass., 492, which is directly in point. The Supreme Court of Judicature of Massachusetts, in a unanimous opinion, declined to follow the decision of the Court of Appeals of the State of New York in the case of Giles *vs.* Austin (supra). In the opinion the English cases of Peachy *vs.* Duke of Somerset (supra); Hill *vs.* Barclay (supra); Reynolds *vs.* Pitt (supra); Bracebridge *vs.* Buckley (supra), and Green *vs.* Bridges (supra), are cited and approved. The court in their opinion point out that the breach of a covenant to pay rent is a very different thing from the breach of a covenant to pay taxes. At page 493, the court say:

> "In this case the defendant entered for breach of the covenant to pay taxes, as well as for breach of the covenant to pay rent. When he exercised his right of reentry, in September, 1902, not only was the tax for 1900 not paid, but the estate of the defendant had been sold because of the plaintiff's failure to pay this tax as he had covenanted to do. The defendant's estate had been sold to pay this tax in the June preceding the September when the defendant entered on the estate. The thing here in question, secured by the right of reentry, not only has not been performed, but it can not be performed now. The tax for 1900 has been paid and no longer can be paid by the plaintiff. The tax was paid to the collector by the application thereto of the proceeds of the tax sale. *There is a right to redeem this tax title, but the tax has been paid, and the thing secured by the landlord's right of reentry can no longer be performed by the tenant. By the very terms of the covenant secured by the forfeiture, any performance of it is at an end, and that is the end of the plaintiff's application for relief from the forfeiture in the case at bar.*
>
> "Moreover if it were permissible to look behind the terms of the covenant here in question

> office, could have ascertained the amount; and if he intended to keep the covenants of the lease it was his duty to do so, and, when ascertained, to pay the amount, without applying to the defendant Park for such information. He knew that the premises had been sold for delinquent taxes, and that the time for redemption would soon expire, and that if the redemption was not made, that Hamilton Park's title to the premises would be defeated."

The following language of the court is also especially relevant, in view of the fact, admitted upon the face of the bills, that after the plaintiff knew not only that the property had been sold for taxes, which she had covenanted to pay, but that that sale had ripened into a deed and was irredeemable, she still, when possessed of such knowledge, wasted weeks in a negotiation with the holder of the tax title, endeavoring to obtain better terms from him:

> "The plaintiff was aware of the covenants in the lease relating to forfeiture. He knew that default had been made in the payment of taxes for several years (the deficit for taxes amounting to about four thousand dollars), and that the premises had been sold for the non-payment of the same, and that the time to redeem had nearly expired; yet he did not intend to redeem until the last day. Such intention and such delay was a gross violation of the covenants of the lease. The evidence shows that Mr. Park (the owner of the premises) was in straitened circumstances. His property was in danger of being sacrificed for the non-payment of taxes. *By forfeiting the lease he ascertained that he could raise the money necessary to redeem the property by releasing the same. It would have been reckless on his part to let such an opportunity pass, and it was absurd for the plaintiff to expect that the lessor would not assert his right of forfeiture for the non-payment of taxes until the last day for*

LXIX of the Lawyers' Reports Annotated. At page 833 will be found a note covering the whole subject of forfeiture, to which counsel respectfully refer the court. They desire to especially call the attention of the court to the case of Gordon *vs.* Richardson, 185 Mass., 492, which is directly in point. The Supreme Court of Judicature of Massachusetts, in a unanimous opinion, declined to follow the decision of the Court of Appeals of the State of New York in the case of Giles *vs.* Austin (supra). In the opinion the English cases of Peachy *vs.* Duke of Somerset (supra); Hill *vs.* Barclay (supra); Reynolds *vs.* Pitt (supra); Bracebridge *vs.* Buckley (supra), and Green *vs.* Bridges (supra), are cited and approved. The court in their opinion point out that the breach of a covenant to pay rent is a very different thing from the breach of a covenant to pay taxes. At page 493, the court say:

> "In this case the defendant entered for breach of the covenant to pay taxes, as well as for breach of the covenant to pay rent. When he exercised his right of reentry, in September, 1902, not only was the tax for 1900 not paid, but the estate of the defendant had been sold because of the plaintiff's failure to pay this tax as he had covenanted to do. The defendant's estate had been sold to pay this tax in the June preceding the September when the defendant entered on the estate. The thing here in question, secured by the right of reentry, not only has not been performed, but it can not be performed now. The tax for 1900 has been paid and no longer can be paid by the plaintiff. The tax was paid to the collector by the application thereto of the proceeds of the tax sale. *There is a right to redeem this tax title, but the tax has been paid, and the thing secured by the landlord's right of reentry can no longer be performed by the tenant. By the very terms of the covenant secured by the forfeiture, any performance of it is at an end, and that is the end of the plaintiff's application for relief from the forfeiture in the case at bar.*
>
> "Moreover if it were permissible to look behind the terms of the covenant here in question to what might be termed its true nature and substance the plaintiff would gain nothing. *If you look beyond its terms, the real substance and nature of a covenant to pay taxes assessed on the demised premises is to protect and hold harmless the landlord's estate.* When the breach of the covenant has reached the stage where the land-

lord's estate has been sold to pay the taxes which the tenant should have paid, and through the default of the tenant a paramount outstanding title has come into existence, *we have a breach of covenant for which the plaintiff fails to show that compensation can be made. It is like the breach of a covenant to insure or repair* where equity does not ordinarily grant relief against forfeiture of the tenant's estate. Mactier *vs.* Osborn, 146 Mass., 399, 402. Hill *vs.* Barclay, 16 Ves., 402, and 18 Ves., 56 (*overruling Lord Erskine's opinion in Sanders* vs. *Pope, 12 Ves., 282, which never went to a decree, p. 294*). Reynolds *vs.* Pitt, 19 Ves., 134. Bracebridge *vs.* Buckley, 2 Price, 200. Green *vs.* Bridges, 4 Sim., 96.

"Lord Erskine's opinion in Sanders *vs.* Pope was in effect that the forfeiture of a leasehold estate for breach of a collateral covenant stood on the same ground at common law as that on which the forfeiture of a bond stands under St. 8 & 9 Wm. III, c. 11, sec. 8, which (as Baron Parke said in Beckham *vs.* Drake, 2 H. L. Cas., 579, 629) 'in effect makes the bond a security only for the damages really sustained.'

"But that view did not prevail. It is settled that in case of waste (Peachy *vs.* Somerset, 1 Stra., 447), in case of a breach of a covenant to make repairs (Hill *vs.* Barclay, 16 Ves., 402, and 18 Ves., 56; Bracebridge *vs.* Buckley, 2 Price, 200), and in case of the breach of a covenant to insure (Reynolds *vs.* Pitt, 19 Ves., 134, Green *vs.* Bridges, 4 Sim., 96), it being impossible for the tenant to show affirmatively that compensation can be made, relief ordinarily will not be given. It was this which C. Allen, J., had in mind in Lundin *vs.* Schoeffel, 167 Mass., 465, 469, when he said of the case then before the court that it 'was not like a case where the omission caused a present injury or increase of risk to the lessors, as in the case of waste, non-repair, or non-insurance."

It appears from the note already referred to (69 L. R. A., pp. 833–865) that although the mere declaration of the forfeiture will not of itself destroy the power of equity to afford relief (in cases of accident, etc.), yet that is an important step towards the assertion of the rights of the obligee, and where he has taken the necessary steps to reassert his title at law, the obligor must make a stronger case to entitle himself to relief.

The authorities in support of this principle are cited under paragraph VIII of the article referred to. In the

> *redemption of the same from the tax sale.* Equity will not relieve against a forfeiture of a lease where the breach of the covenants has been so culpable, long persisted in, and detrimental as the evidence in this case shows the breaches to have been."

In the case of *Baldwin* v. *Reese et al.*, (see opinion of court in Appendix B of this brief), decided in the Superior Court of Cincinnati in the year 1880, the direct question here concerned was presented, and the court said:

> "The defendant (tenant) is not entitled to an account of the amount of unpaid taxes to enable him to make a tender. The wrong done by omitting to pay taxes, in violation of the covenant, does not give a right to call for an account. It is his business to know. But if the amount due on account of unpaid taxes were perfectly ascertained, defendant could not relieve the forfeiture by making tender of it. Non-payment of taxes is not like non-payment of rent; *it puts in jeopardy the estate of the lessor, and equity does not relieve against such a forfeiture.*"

Certain American cases, in which relief was given by a court of equity to a defaulting lessee, will now be considered.

The case of *Sanborn* v. *Woodman*, 5 Cushing, 36, was the failure to pay a definite sum of money due as interest on an assumed mortgage. The decision was on that point alone.

The case of *Hancock, Admr.*, v. *Carlton*, 6 Gray, 39, was one of failure to pay an encumbrance assumed by a purchaser. Relief refused on the ground of *laches*.

The case of *Mactier* v. *Osborn*, 146 Mass. 399, was one in which the lessee had really, although not formally, kept his covenant to insure. The lessor had been exposed to no danger. Relief was given on the ground of accident

breach of a covenant to insure or repair where equity does not ordinarily grant relief against forfeiture of the tenant's estate. Mactier *vs.* Osborn, 146 Mass., 399, 402. Hill *vs.* Barclay, 16 Ves., 402, and 18 Ves., 56 (*overruling Lord Erskine's opinion in Sanders* vs. *Pope, 12 Ves., 282, which never went to a decree, p. 294*). Reynolds *vs.* Pitt, 19 Ves., 134. Bracebridge *vs.* Buckley, 2 Price, 200. Green *vs.* Bridges, 4 Sim., 96.

"Lord Erskine's opinion in Sanders *vs.* Pope was in effect that the forfeiture of a leasehold estate for breach of a collateral covenant stood on the same ground at common law as that on which the forfeiture of a bond stands under St. 8 & 9 Wm. III, c. 11, sec. 8, which (as Baron Parke said in Beckham *vs.* Drake, 2 H. L. Cas., 579, 629) 'in effect makes the bond a security only for the damages really sustained.'

"But that view did not prevail. It is settled that in case of waste (Peachy *vs.* Somerset, 1 Stra., 447), in case of a breach of a covenant to make repairs (Hill *vs.* Barclay, 16 Ves., 402, and 18 Ves., 56; Bracebridge *vs.* Buckley, 2 Price, 200), and in case of the breach of a covenant to insure (Reynolds *vs.* Pitt, 19 Ves., 134, Green *vs.* Bridges, 4 Sim., 96), it being impossible for the tenant to show affirmatively that compensation can be made, relief ordinarily will not be given. It was this which C. Allen, J., had in mind in Lundin *vs.* Schoeffel, 167 Mass., 465, 469, when he said of the case then before the court that it 'was not like a case where the omission caused a present injury or increase of risk to the lessors, as in the case of waste, non-repair, or non-insurance."

It appears from the note already referred to (69 L. R. A., pp. 833–865) that although the mere declaration of the forfeiture will not of itself destroy the power of equity to afford relief (in cases of accident, etc.), yet that is an important step towards the assertion of the rights of the obligee, and where he has taken the necessary steps to reassert his title at law, the obligor must make a stronger case to entitle himself to relief.

The authorities in support of this principle are cited under paragraph VIII of the article referred to. In the case at bar the bill is filed by the tenant to enjoin proceedings at law by the landlord to regain possession of the demised premises after a forfeiture declared by the landlord. It will be noted in the case of Gordon *vs.* Richardson that the case of Sanders *vs.* Pope (supra), is referred to as having been overruled.

will not relieve against a forfeiture of a lease where the breach of the covenants has been so culpable, long persisted in, and detrimental as the evidence in this case shows the breaches to have been."

In the case of *Baldwin* v. *Reese et al.*, (see opinion of court in Appendix B of this brief), decided in the Superior Court of Cincinnati in the year 1880, the direct question here concerned was presented, and the court said:

> "The defendant (tenant) is not entitled to an account of the amount of unpaid taxes to enable him to make a tender. The wrong done by omitting to pay taxes, in violation of the covenant, does not give a right to call for an account. It is his business to know. But if the amount due on account of unpaid taxes were perfectly ascertained, defendant could not relieve the forfeiture by making tender of it. Non-payment of taxes is not like non-payment of rent; *it puts in jeopardy the estate of the lessor, and equity does not relieve against such a forfeiture.*"

Certain American cases, in which relief was given by a court of equity to a defaulting lessee, will now be considered.

The case of *Sanborn* v. *Woodman*, 5 Cushing, 36, was the failure to pay a definite sum of money due as interest on an assumed mortgage. The decision was on that point alone.

The case of *Hancock, Admr.*, v. *Carlton*, 6 Gray, 39, was one of failure to pay an encumbrance assumed by a purchaser. Relief refused on the ground of *laches*.

The case of *Mactier* v. *Osborn*, 146 Mass. 399, was one in which the lessee had really, although not formally, kept his covenant to insure. The lessor had been exposed to no danger. Relief was given on the ground of accident

or mistake of third persons misleading the lessee. The court say (p. 403):

> "The property has been all the time fully insured. It (failure to insure in due form) was an occurrence not anticipated by her (lessee) and not known to her until after the demandant entered to enforce a forfeiture. No misconduct or culpable fault can be attributed to her."

The case of *Lundin* v. *Schoeffel*, 167 Mass. 465, was really one of vexatious litigation. Two alleged causes of forfeiture were adjudged trifling; the third was a question of reasonable delay in making repairs to demised premises. The case was decided on these grounds. The court say, (*obiter*):

> "But the lessees' failure in this case was mainly an omission to do something promptly which was only useful to the lessors by way of security for the future payments of rent. It was not like a case where the omission *caused a present injury or increase of risk to the lessors*, as in the case of waste, non-repair, or non-insurance" (p. 469).

The case of *Giles* v. *Austin*, 62 N. Y. 486, is authority for the proposition that a covenant to pay taxes by a lessee is in the nature of a covenant to pay money. In that case payment of the taxes in default had been made before they had become irredeemable, and no rights of third persons had attached (p. 493).

The opinion does not honor with a passing glance the real question in all such cases, to wit: the danger to which the lessor has been exposed by the lessee's default, and the impossibility of compensating such danger. The case of *Garner* v. *Hannah*, 6 Duer. 262, is a decision of the Superior Court of the city of New York, cited by the Court of Appeals as authority for their decision in the case first named. There, also, was a covenant to pay

taxes and a breach by the lessee. But there, also, the court say (p. 274):

> "Relief may be granted against the breach of an agreement, not wilful or fraudulent, *when full compensation* can be made, so as to render the party fully secured and indemnified, and place him in the same situation as if the occurrence had not happened."

The case of *Noyes* v. *Anderson*, 124 N. Y. 175, follows the preceding case of *Giles* v. *Austin* (*supra*). There is a strong dissent (p. 183), in which the true nature of a covenant to pay taxes is set forth. The decision of the court turns upon the fact that the mortgagor, who had covenanted to pay certain taxes, and who did not live in the city where the taxes were assessed, left the matter of taxes in charge of her son, who did live there. He paid the taxes in 1886 and had in his hands the mortgagor's money with which to pay the assessment in question, of whose existence he did not know. It appears that he might have ascertained about it at the office of the clerk of arrears, but when he paid the taxes of 1886 at the tax office in the city, he was upon his inquiry informed by some one in the office that there was no sum due or in arrears against the property. It is clear that his purpose was to pay the taxes and assessments, and that his failure to make an earlier payment in this instance was not wilful neglect on his part, nor was the plaintiff prejudiced by it.

The case of *McClartey* v. *Gokey*, 31 Iowa, 506, turned upon the indefiniteness of the contract in question there with respect to the time when certain taxes should be paid.

The case of *South Penn Oil Co.* v. *Edgell*, 48 West Va. 348, was determined explicitly and narrowly upon the ground that a certain supply of gas provided for in a lease was "a rental consideration easily ascertainable

in money, and that so far as it was concerned the forfeiture was in the nature of a penalty to secure the gas right to the appellants, against which a court of equity will grant relief on the payment of the damages to be properly ascertained, etc."

The case of *Tibbetts* v. *Cate*, 66 N. H. 550, went upon the ground that the lessee was ignorant of business, and that her failure to pay taxes as covenanted was not wilful.

The case of *Kopper* v. *Dyer*, 59 Vt. 477, was one in which a mortgagor, without his fault or neglect, was prevented by accident from paying an instalment on the day named in a decree of foreclosure. Relief was granted because the complainant's failure to pay the covenanted sum arose from "an unforeseen and an unexpected occurrence, external to himself, of which his agency was not the proximate nor even the remote cause, and thereby he was prevented from sending his money seasonably in a form that would have been treated as payment, etc." (p. 488).

The case of *Eichenlaub et al* v. *Neil*, 3 Ohio Dec. 365, will be recurred to in connection with the subject of demand, and also upon the general subject under discussion. While it is the decision of an inferior court nevertheless it deserves careful consideration.

Of these cases, generally, it is to be said that the decisions in them do not commend themselves by any strength of judicial reasoning. Several of them rely for authority upon the overruled English case of *Sanders* v. *Pope* (*supra*). It is only in the dissenting opinion in the case of *Noyes* v. *Anderson* (*supra*), that the radical difference is pointed out between a covenant whose breach involves only a postponement in the payment of money and a covenant whose breach involves the loss of a house by fire, or of real estate by a transfer of title under violated tax laws.

As opposed to the lax utterances of these cases on the general principles of the law of forfeiture, we have the following decisions of American courts:

In the case of *Clark* v. *Barnard*, 108 U. S. 436, this court interpreted an instrument as imposing a statutory penalty and not constituting a mere security, although the case was a hard one. At page 456 Mr. Justice Matthews strikes the true note:

> "It has accordingly been uniformly held in cases too numerous for citation, that courts of equity will not interfere in cases of forfeiture for the breach of covenants and conditions where there *can not be any just compensation decreed for the breach*, for, as was said by Lord Chancellor Macclesfield in *Peachy* v. *Duke of Somerset*, 1 Strange, 447, *'it is the recompense that gives this court a handle to grant relief.'*"

In *Klein* v. *Insurance Co.*, 104 U. S. 88, this court said (p. 90) in declining to relieve a forfeiture under a life insurance policy:

> "In *Rose* v. *Rose* (Amb. 331, 332), Lord Hardwicke laid down the rule thus: 'Equity will relieve against all penalties whatsoever, against nonpayment of money at a day certain, against forfeitures of copyholds, but they are all cases where the court *can do it with safety to the other party*, for if the court can not put him in as good condition as if the agreement had been performed, the court will not relieve.'"

So in *Thompson* v. *Insurance Co.*, 104 U. S. 252, this court said in a similar case to that last cited (p. 257):

> "In the second replication the excuse set up is, that before the note fell due Thompson became sick and mentally and physically incapable of attending to business until his death, on the 3d day of November, 1874, and that the plaintiff was ignorant of the outstanding note. We have lately

held, in the case of *Klein* v. *Insurance Company*, supra, p. 88, that sickness or incapacity is no ground for avoiding the forfeiture of a life policy, or for granting relief in equity against forfeiture. The rule may, in many cases, be a hard one; but it strictly follows from the position that the time of payment of premium is material in this contract, as was decided in the case of *New York Life Insurance Co.* v *Statham*, 93 U. S. 24. Prompt payment and regular interest constitute the life and soul of the life insurance business; and the sentiment long prevailed that it could not be carried on without the ability to impose stringent conditions for delinquency. More liberal views have obtained on this subject in recent years, and a wiser policy now often provides express modes of avoiding the odious result of forfeiture. The law, however, has not been changed, and if a forfeiture is provided for in case of nonpayment at the day, the courts can not grant relief against it. The insurer may waive it, or may by his conduct lose his right to enforce it; but that is all."

Again, the court say (p. 260):

"Courts do not favor forfeitures, but they can not avoid enforcing them when the party by whose default they are incurred can not show some good and stable ground in the conduct of the other party on which to base a reasonable excuse for the default. We think that no such ground has been shown in the present case, and that it does not come to the line of any of the previous cases referred to in which the excuse has been allowed. We do not accept the position that the payment of the annual premium is a *condition precedent* to the continuance of the policy. That is untrue. It is a condition subsequent only, the non-performance of which may incur a forfeiture of the policy, or may not, according to the circumstances. It is always open for the insured to show a waiver of the condition or a course of

> conduct on the part of the insurer which gave him just and reasonable ground to infer that a forfeiture would not be enacted; but it must be a just and reasonable ground, one on which the assured has a right to rely."

At the present term, in the as yet unreported case of *The Nederland Insurance Company, Limited*, v. *Mary Meinert*, No. 11, October Term, 1905, this court reversed the United States Circuit Court of Appeals for the Seventh Circuit, and sustained a forfeiture by reason of failure to pay premiums upon a life insurance policy. The court said:

> "Forfeitures, though generally not regarded with favor by courts of equity, yet are necessary, and should be fairly enforced, in cases of life insurance. Promptness of payment is essential in such business (*Life Ins. Co.* v. *Statham*, 93 U. S. 24–30).
>
> "Where, therefore, the assured has, in truth, received notice (as provided by statute) of the time of payment of the premium, its amount, and where it can be paid, and a statement is made in the words of the statute itself as to the effect of nonpayment, a mistaken additional statement like the one made here ought not to be held a failure to comply with the terms of the statute and thus prevent a forfeiture, which the assured evidently contemplated."

The case of *Skinner* v. *Dayton*, 2 Johns. Ch. 526, was one involving the question as to whether or not certain payments under a contract were intended as penalties or forfeitures. Chancellor Kent said (p. 535):

> "It is, no doubt, a general principle of the court that equity will relieve where a penalty is forfeited if the case admits of a certain compensation; and the true foundation of the relief is that when penalties are designed only to secure money or damages really incurred, if the party obtains

> his money or damages he gets all that he expected or required. . . . In all the cases in which the court does interfere with the legal right it must appear clearly that full compensation can be made, so as to render the party perfectly secure and indemnified, and place him in the same position as if the occurrence had not happened."

In the case of *Baxter* v. *Lansing*, 7 Paige's Ch. Rep., p. 350, Chancellor Walworth said (p. 352):

> "But the decisions in the more recent English cases limit the act or interference of a court of equity in behalf of the defendant to those cases only where the act or omission by which the forfeiture incurred was the result of accident or mistake, and where compensation can be made to the adverse party, or where the penalty or forfeiture stipulated for in the lease is in the nature of a mere security for the payment of money, etc. *Hill* v. *Barclay*, 16 Ves. 402, 18 *Ibid.* 56; *Reynolds* v. *Pitt*, 19 *Ibid.* 134; *White* v. *Warner*, 2, Mer. 459; *Bracebridge* v. *Buckley*, 2 Price's Rep. 200."

The case of *Dunklee* v. *Adams, Adm.*, 20 Vermont, 415, was one involving forfeiture for the non-performance of a covenant, consisting in the rendering of certain services and attentions for the personal comfort and convenience of the party claiming the forfeiture. At page 421 the court say, referring to the earlier English cases:

> "But the soundness of the early doctrine in regard to the granting of relief against forfeitures of estates, incurred by the non-performance of collateral acts, has been more recently denied in England, and it now appears to be the established doctrine, that relief will only be granted where a breach of the condition is for the non-payment of money; and it is granted in such cases on the principle, that the allowance of interest for the

> delay forms a certain rule of compensation and is equivalent to a payment at the day. *Wadman* v. *Calcraft*, 10 Ves. 68; *Hill* v. *Barclay*, 16 *Ibid.* 403, 18 *Ibid.* 59; *Reynolds* v. *Pitt*, 19 *Ibid.* 140–141; *Bracebridge* v. *Buckley*, 2 Price's Rep. 200; *Rolfe* v. *Harris*, 2 *Ibid.* 206, Note; Eden on Inj., 46–48."

In the case of *The Ottawa Northern Plank Road Company* v. *Murray*, 15 Ill. 336, the court said (p. 339):

> "By the terms of the mortgage, the principal was to become due on the failure of the company to pay the interest promptly. It failed to pay the first instalment of interest when it fell due, and the mortgage was thereby forfeited. The proof introduced by the company did not sustain the allegation of the answer, that the complainant waived the forfeiture by afterwards accepting the interest. He refused to receive the money tendered, and thereby insisted upon the forfeiture.
>
> "The decree must be confirmed."

In the case of *Noonan* v. *Lee*, 2 Black, 499, the court say (p. 500):

> "The proofs in this case show, that before filing his bill, Lee (the mortgagee) notified Noonan (the mortgagor) that he elected to consider the entire amount of the mortgage debt as due. This entitled him to a decree for the full amount, although, according to the terms of the bond, one of the instalments was not due when the bill was filed. *Noyes* v. *Clark*, 7 Paige, 180."

The case of *Hukill* v. *Guffey*, 37 W. Va. 425, was one in which relief was sought against forfeiture of a lease for the non-performance of certain covenants therein. The court said (p. 448):

> "The one great thing to be done was the specific act of boring; its breach clearly non-compensable

with so small a sum as the commutation of money. I take the rule to be settled by a multitude of authorities that, before a court of conscience will relieve against a forfeiture of such a lease, there must be a fair and reasonable commutation as alternative for the main thing to be done, or the damages from failure to do such main thing must be measurable in money, with some reasonable degree of certainty, or there must be some special circumstances calling for relief from the forfeiture caused by the party's failure to perform the specific act which he covenanted to perform."

Upon a reargument of this case the court (pp. 463–464) reviewed the authorities hereinbefore referred to upon this point, as follows:

"One of the leading cases on the doctrine of relief in equity against penalties and forfeitures is *Peachy* v. *Duke of Somerset*, 1 Strange, 447, 2 White & T. Lead. Cas. Eq. (4th Amer. ed.) pt. 2, p. 2014. 'The true ground of relief against penalties is from the original intent of the case, where the penalty is designed only to secure money, and the court can give by way of recompense all that was expected or desired.' . . . 'From a very early period equity would at any indefinite time after a tenant had incurred forfeiture and been ejected for non-payment of rent at a particular time, under a stipulation in his lease, relieve him upon his paying to the lessor the rent, accrued interest, and costs, upon this principle: that, as the right of entry was intended merely as a security for the rent, the lessor thereby received full compensation, and was put in the same situation as if the rent had been paid to him when originally due. This principle was recognized by the legislature, which, however, remedied a palpable injustice by limiting the time within which the lessee might obtain relief by filing a bill.' See 2 White & T. Lead. Cas. Eq., *supra*, p. 2026, referring to English statutes similar to sections 16, 17, *et seq.*, of chapter 93.

"But equity will not relieve against forfeiture from the breach of covenants where compensation can not be made. *Gregory* v. *Wilson*, 9 Hare, 685m, 689. Hence equity will not in general, and in the absence of special circumstances calling for interference, give relief in cases of forfeiture growing out of breach of covenant for repairing, insuring, or doing any specific act, because in such cases it is unknown what the measure of damages shall be. *Wafer* v. *Mocatto*, 9 Mod. 112; *Reynolds* v. *Pitt*, 19 Ves. 141.

"Courts of equity will not interfere in cases of forfeiture for breach of covenants and conditions to do specific things, other than the payment of money, for they admit of no just compensation or clear estimate of damages; and it is a universal rule in equity never to enforce either a penalty or a forfeiture. See 2 Story, Eq. Jur. (13th ed.), 1319–24, and cases cited. Even 'in a case where an agreement creates a mere pecuniary obligation, so that a forfeiture incurred by its breach would ordinarily be set aside, a court of equity will refuse to aid a defaulting party, and relieve against a forfeiture, if his violation of the contract was the result of gross negligence, or was wilful and persistent. He who asks help from a court of equity must himself be free from inequitable conduct with respect to the same subject matter.' See 1 Pom. Eq. Jur., sec. 452.

"The general principles 'underlie all the cases which abound upon the subject, and have been canonized in the standard elementary works. They recommend themselves to every man's common sense of reason and justice, in view of the special objects which courts of equity have been constituted to effectuate.' Justice Sharswood in *Oil Creek Railroad Co.* v. *Atlantic, etc., R. Co.*, 57 Pa. St. 65."

In the case of *People's Bank* v. *Mitchell*, 73 N. Y. 406, the lessee had covenanted to pay all taxes and assessments, and in case of failure the lessor was entitled

to reenter. In case the lessee built permanent buildings on the demised premises during the term and performed all the covenants on his part, it was covenanted that the lessor should either extend the term or pay the lessee the value of the buildings, etc. The lessee erected a building on the premises. The lease expired May 1, 1867. The lessee failed to pay taxes for the year 1866. The lessor learned for the first time after the expiration of the lease that the lessee had not paid the taxes; he declined to give a new lease, took possession at the end of the term, and refused to pay for the building. The lessee thereupon sued for the value of the building. The court held that the action was not maintainable; that the payment of the taxes was a condition precedent, the performance of which, in the absence of evidence showing a valid excuse for non-performance, was essential to fix the liability of the lessor. The court further held (p. 415) that there was no ground in the complaint in evidence upon which a court of equity should interfere to relieve the lessee from the consequence of his failure to perform. Upon this point the court said (p. 414):

> "The counsel for the plaintiff seeks to avoid the effect of the default in the payment of the taxes, upon the ground that there was only a technical forfeiture, which a court of equity will relieve. Equity will relieve against a breach of covenant for the payment of money, where the covenant is in the nature of a penalty or forfeiture, and designed merely as a security to enforce the principal obligation, and in such case only where, by the payment of money, the parties can be put in the same position as if there had been no default. . . . So, also, in case of mistake, accident, fraud, or surprise, relief was obtained in equity; but the rules stated, which were sometimes invoked to prevent injustice, have no application where, as in the case at bar, the mode of determining the rights of the lessor, or his assigns, to a new lease or to payment for his building was

> expressly provided for and dependent upon the performance of conditions precedent which have not been performed. There is no ground upon which a court of equity should intervene to relieve the lessee from the consequence of a failure or neglect to perform."

In the case of *Parsons* v. *Smilie*, 97 Cal. 647, the court held that failure to maintain a lumber yard for the prescribed time upon premises that had been sold was a violation of a condition subsequent, which would justify the grantor in reentering and avoiding the conveyance. The court, in its opinion, reviewed the English authorities hereinbefore cited, and said (p. 653):

> "So there are numerous cases arising under leases, and in contracts where time is not of the essence of the contract, in which courts of equity will relieve against a forfeiture. The general doctrine is, that equity will relieve where the thing may be done afterwards, or compensation can be made for it, but that unless a full compensation can be given, so as to put the party in precisely the same situation, a court of equity will not interfere; for such jurisdiction would be arbitrary. Washburn (Real Property, vol. 2, p. 23) says: 'And the only cases where equity interposes as to such conditions are where the failure of performance has been the effect of accident, and the injury is capable of compensation in damages which the court has the means of measuring, and where the grantor can be made perfectly secure and indemnified, and can be placed in the same situation as if the occurrence had not happened. This applies to cases where the condition is for the payment of money at a particular time, and compensation for the delay can be measured by the interest during that time. But where the condition is for the performance of a collateral act, the rule is different, as the court has no standard by which to measure damages.' (*Livingston* v. *Tompkins*, 4 Johns. Ch. 415, 431; *Bacon* v. *Huntington*, 14

> Conn. 92; *Hill* v. *Barclay*, 18 Ves. 56; *Henry* v. *Tupper*, 29 Vt. 358, 372.) The same author again says (p. 23): 'But if the act be wilfully done, or one for which the court has no certain rule by which to measure the damages, beyond their own arbitrary judgment in the matter, equity will not relieve.' (See, also, *Descarleti* v. *Dennett*, 9 Mod. 22; *Wafer* v. *Mocatto*, 9 Mod. 112; *Northcote* v. *Duke*, 2 Eden 322.) In *Elliott* v. *Turner*, 13 Sim. 485, it is held that 'wilful,' in such a case, is the same as a voluntary act of the party."

See, also, case of—

> *South Carolina Co.* v. *Augusta Co.*, 111 Ga. 420, 425.

We may claim thus far to have established the proposition that a court of equity will not relieve a tenant from a forfeiture incurred by breach of a covenant to pay taxes, in consequence of which breach a third party has acquired a deed to the demised premises, unless the breach was the result of fraud, accident, mistake, or surprise.

Whether such a breach has been established by the testimony, as also whether the landlord has waived any breach or has estopped herself from asserting it, we shall consider later. The discussion of this first question is relevant to the first, second, third, and fourth assignments of error. Let us pass on now to the next question.

QUESTION II.

Is Such Breach One that Can be Compensated to a Landlord?

While this topic has already been considered, nevertheless its importance requires a more detailed study.

The opinion of the Court of Appeals of the District of Columbia upon the interlocutory appeal deals summarily with the question. The covenant to pay taxes is viewed

as merely a covenant to pay money (21 App. D. C. p. 151). When it is urged that a breach may mean loss of the property, the answer is that the lessor must be vigilant to see that the lessee does not commit a breach (*Ibid*, p. 152). These utterances, judicial though they are, would seem to be destructive of elemental contract rights.

Upon the declaration of the Court of Appeals the covenant to repair and the covenant to insure are equally mere covenants to pay money. They constitute a part of the rent just as much as the covenant to pay taxes.

If we turn to the reasoned opinions of courts to learn what the general nature and effect of the covenant to pay taxes are, we find clear and authoritative statements on the subject.

Directly in point is the case of *Hand* v. *Suravitz*, 148 Penna. St. 202. This was a case in which a lease of certain demised premises provided that the lessee should pay his own gas and water bills; it further provided that if the lessee should fail so to do, the lessor might declare the lease forfeited. Chief Justice Paxson delivered the unanimous opinion of the court, and at page 207 said:

> "The defendant entered into the occupation of the demised premises, and remained in possession for about seventeen months, and during that time paid no water rents. The plaintiff, by virtue of the power contained in the lease, caused a judgment to be entered in ejectment against the defendant for the premises, and a writ of *habere facias possessionem* to be issued. Upon the application of the defendant, the court below stayed the writ, and granted a rule to show cause why the judgment should not be opened and defendant let into a defense. It is not denied that he had notice to pay the water rent, and that he did not pay it. The court below held that the stipulation in the lease, that the 'lessee shall pay his own gas and water bills,' did not admit of the construction that a failure to keep and perform it

would work a forfeiture of the lease, and made the rule to open absolute, and ordered the judgment to be vacated.

"We do not regard the clause in reference to the water rents as a mere declaration as to who is to pay for the gas and water furnished on the premises. Nor do we think there is any ambiguity as to who the water rents are to be paid to. The water rents are payable, as every intelligent man knows, to the water company furnishing the water. When, therefore, a tenant covenants in his lease to pay the gas bills or the water rents, it is as much a condition of his holding as any other covenant therein. If they are not paid, and the tenant vacates the premises, the landlord is obliged to pay them, or have the gas and water cut off from his premises. The latter has a right to protect himself against this and to enforce a lawful covenant for that purpose in the lease. It was held in *Fernwood Masonic Hall Association* v. *Jones*, 102 Pa. 307, that where, in a lease, the lessee covenants to pay the lessor for all gas consumed on the premises, a sum due for gas consumed is to be regarded as rent in arrear, and may be distrained for. While forfeitures are not favored in the law, I apprehend no one will dispute the right of a landlord to forfeit for non-payment of rent, where apt words of forfeiture are embodied in the lease. The right is equally clear to forfeit for non-payment of water rents where that is the agreement of the parties. In the case in hand the defendant distinctly agreed that his lease might be forfeited for such non-payment. He could have avoided it by paying the bills.

"The order of the court below, opening and vacating the judgment, is reversed and set aside, and the judgment is reinstated."

In the case of *Rector, etc., of Trinity Church* v. *Higgins*, 48 N. Y. 532, the question was concerning the effect of a covenant in a lease whereby the defendant covenanted to bear, pay, and discharge all such duties,

taxes, assessments, and payments, of what nature or kind soever, as should, during the term aforesaid, be imposed on, or grow due or payable out of, or for, or by reason of the said demised premises, or any part or parcel thereof. It appeared that two assessments, amounting to $4,875, had been imposed by the city authorities, but that they had not taken any proceedings to enforce the collection thereof, although the defendant had not paid them. The court held (p. 535):

> "The covenant of the defendant is affirmative and positive, not collateral or secondary, in its terms. He covenants to 'bear, pay, and discharge all taxes and assessments,' etc., as an obligation or debt of his own, and the language conveys no idea that the plaintiffs are first to bear and pay, before the demand becomes obligatory upon the defendant for payment.
>
> "The covenant is broken when the defendant neglects to pay taxes or assessments duly imposed. The defendant is not at liberty to say that it is the debt of the plaintiffs; let them first pay it, and I will pay them. It is his own debt, made so by the terms of his covenant.
>
> "The distinction between a covenant or promise whereby the defendant makes the amount to be paid his own debt, and one simply of indemnity whereby the covenant or promise is not broken until the amount has been paid by the plaintiff, pervades all the cases upon this subject, from the case of *Jackson* v. *Port* (17 J. R. 479), when the rule became somewhat settled and defined, until that of *Gilbert* v. *Wiman* (1 N. Y. R. 550)."

The court further held (p. 537):

> "The rule may be definitely drawn from numerous cases, that where indemnity only is expressed, damages must be sustained before a recovery can be had; but a positive agreement to do an act which is to prevent damage to the plaintiff will sustain an action where the defendant neglects or refuses to do such act. (Numerous

cases cited). . . . (P. 538.) Parties have the just right to make all lawful contracts guarding their rights and securing the performance of their intentions, including that of contravening the rule of actual compensation for actual loss; and whe expressed in apt and suitable language, it would be flagrant wrong if courts of justice should assume t disregard it, in favor of some technical rule framed for other and wholly different circumstances. I think it a sound and wholesome rule to construe a lawful contract according to its plainly expressed meaning, being governed also by the rules of construction which have been established by precedents.

"It is urged by the counsel for the defendant that the covenant should be construed to be for indemnity merely, because neither the particular tax or assessment, nor the time of payment, nor the person or corporation to whom payable, are stated in the covenant of the defendant. The covenant appears to be specific and certain without these particulars. That is certain which is capable of being rendered certain. The covenant is to pay all such taxes and assessments as shall be imposed during the term mentioned in the lease. Before the action was brought, the assessments for certain sums had been imposed. Several years had elapsed, and the defendant had neglected to pay them, according to his covenant. I am unable to perceive that the objection referred to has been well taken . . . (p. 539). It was doubtless to guard against the contingency of a sale of the premises by the city corporation, to obtain payment of the sums assessed, that the covenant was inserted in the lease. *The sale of the premises would involve a loss of the security for the rent reserved, and probably of the reversion.*"

In the case of *Noyes* v. *Anderson*, 124 N. Y. 175, Parker, J., and Follett, C. J., dissenting, say (p. 183):

"A stipulation that a debt, the payment of which is secured by a mortgage on real estate,

> shall become due and the security foreclosable, upon the failure of the mortgagor to pay interest as it falls due, or the taxes assessed on the mortgaged premises, is neither a penalty nor a forfeiture, and a court, in the absence of fraud on the part of the mortgagee, can not relieve the mortgagor from the consequences of his neglect to pay according to the terms of his contract (Jones on Mortgages, sections 77, 1180, 1181, 1182; Withers on Mort. For., sections 43, 44, 45, 46, 47; Thomas on Mortgages, section 228, and the cases cited in the sections of the text books referred to). . . . From the failure to pay taxes or assessments the court can no more relieve a party than from the failure to pay interest, which it can not do in the absence of fault on the part of the mortgagee (*Hale* v. *Gouverneur*, 4 Edw.Ch. 207; *Spring* v. *Fich*, 21 N. J. Eq. 175, 178; *Ferris* v. *Ferris*, 28 Barb. 29; *Bennett* v. *Stevenson*, 53 N. Y. (508). It is not asserted here that the mortgagee was in fault. The defendant merely attempts to excuse her neglect. A similar attempt was made in *Ferris* v. *Ferris* (*supra*), but without avail."

No damages could compensate for a breach of this covenant resulting in a valid sale and conveyance of of the demised premises to a purchaser at a tax sale.

> "The common law treats as universal a proposition which is for the most part, but not universally true, namely, that money is a measure of every loss. The defect of justice which arose from this universality of the common law principle was met and remedied in certain cases by the jurisdiction of courts of equity to compel specific performance."
>
> Fry on the Specific Performance of Contracts, Sec. 41.

We respectfully submit that it can not be said with any show of reason or authority that a covenant to insure or a covenant to pay taxes can be considered as a

mere pecuniary contract and as constituting a part of the covenant to pay a mere sum of money as rent. The right of the landlord to make this covenant is as much a right of property as any other right that he has. It can not lawfully be taken from him save by process of eminent domain, judicial execution, or some other competent legal proceeding. As was said by Lord Eldon in *Hill* v. *Barclay*, 18 Ves. 63:

> "It is sufficient that the lessor insists upon his covenant; *and no one has a right to put him in a different situation.*"

In the same case (p. 62) Lord Eldon said in answer to a suggestion that the lessor was no worse off by reason of the breach of a covenant to repair if the repairs were in fact made before the close of the term: "*The court is surely not authorized so to deal with contracts.*"

In the case of *Rolfe* v. *Harris* (*supra*) Vice-Chancellor Plumer said:

> "Why in such cases as these, of relief against breach of contract, is a court of equity to be called on to make a new contract? The parties agree that if a condition be broken the lessor shall reenter; and the court is asked to give damages instead. What damages can the court give? And what damages would reconcile a man to a tenant who breaks his contract, and brings his landlord before a court of equity by a bill to be relieved against the effect of his own injurious neglect and to defeat the landlord's remedy for the breach of the condition on which he holds, because he has done so? . . . In this very sort of case, too, how can we, when a risk has been run, estimate the *quantum* of that risk in damages? This is such a breach of covenant as is out of the measurement of damages; and the effect of giving the relief prayed would be that any tenant may hereafter break this special covenant with impunity, and every landlord must be content to take his tenant for his insurer for want of power to enforce his covenant."

In the case of *Green* v. *Bridges* (*supra*), Vice-Chancellor Shadwell said with respect to a breach of covenant to insure:

> "In this case the landlord could not, by any payment of money, be put into the same situation as he was entitled to be under the covenant."

In the case of *Reynolds* v. *Pitt* (*supra*), Lord Eldon said:

> "Where a man has covenanted to keep premises demised to him insured from fire, that the lessor may not be exposed to that evil, as a tenant can not himself reimburse him, and the effect of that contract is secured by reserving a right of entry if the tenant has wilfully and obstinately prevented that insurance and it has so subsisted for one, two, or three years (for where is it to stop?), upon what principle is a court of equity to say that a tenant who has so neglected to fulfil his contract shall insist that the landlord shall keep all the terms with him as if he had duly performed it?"

In the case of *Bracebridge* v. *Buckley* (*supra*), Richards, Baron, said:

> "No doubt, the contract of these parties required that 1,000 pounds should be laid out within a year, and I wish to know how what they contracted for can now be done. If not done within the given time the contract is not performed. The lessor can not call on this court to compel the lessee to perform the contract; and why should the lessee call on the lessor to forego it?"

In the same case Graham, Baron, said:

> "I agree that a court of equity will relieve where a complete compensation can be effectually made and the party put *in statu quo*. But I am

> at a loss to understand what is meant by compensation in such a case as this." (This case was one of repairs only.)

Thompson, Chief Baron, said in the same case:

> "It really comes to a question whether in all cases of reentry on breach of covenant, a court of equity will do away the covenant."

The suggestion is made that the tax sale and deed may be redeemed or are invalid. But is this a compensation? I have a servant whom I have hired for twelve months; he steals from me during the first month; must I keep him if he repays me the stolen money, or may I protect myself by his discharge?

Have I a legal right to let my ground to a tenant who agrees to take the trouble of insurance and taxpaying off my hands? If I find that he has not insured, must I keep him, at my risk, for the whole term because he offers to pay the insurance for my burned house? Must I again trust to his covenant to insure, or must I disregard his covenant, and myself insure, or must I watch and persuade him to keep his covenant? Why should I lose the benefit of my contract through no fault of mine? Why should I be compelled to keep an unreliable tenant, who has already exposed me to great risk and possible loss, because he promises to be more careful in the future? I may discharge my dishonest servant without payment of his wages not yet due. Why must I keep my unreliable tenant, who has allowed a third party to acquire title to my property? It is true that this tax-deed may be invalid, but the next one may be valid.

"*Misera est servitus ubi jus est vagum.*" If this sentimental stuff be law, let us cease advising our clients where women or forfeitures are concerned.

The question, which ought to be a distinct legal question, comes back: What compensation can my tenant

make to me, when he has allowed my property to be sold and conveyed for defaulted taxes, for such act of his, *if I am forced to keep him for the balance of the term?*

Who can estimate the compensation for the danger I have been in?

Who can estimate the danger I shall continue to be in for the balance of the term?

It is submitted that this question must be answered in the negative.

The discussion of this second question is also relevant to the first, second, third, and fourth assignments of error.

QUESTION III.

Must the Landlord in Such Case Make any Demand upon the Tenant Before Declaring a Forfeiture, and, if so, for What?

Before discussing authorities, it may be well to consider the circumstances of the particular case. If there had been a mere default made by the tenant, and if a demand upon her would have enabled her to redeem, then the discussion of this question of law would be pertinent. It is true that it is said (see averments of original bill, Rec. pp. 5 and 6), that in the particular case such a demand would have resulted in the tenant's at once purchasing from Wiltsie, the holder of the tax title, the tax certificate in question. Whether she would have done so or not we can not know. Whether Wiltsie would have continued his willingness to sell we can not know. But, of course, the facts of this particular case in these regards can not constitute a rule of law. We are dealing with a case in which there has not only been a tax sale, but the same has become irredeemable. Therefore, the ability to redeem would depend entirely upon the will of the adverse holder. A demand upon the lessee by the

lessor that she, the lessee, should redeem, would be a demand which the lessee might or might not be able to comply with. But no rule of law is based upon such an uncertain foundation. Indeed, it is not pretended that any such rule exists; and it is thought that no authority can be found for it.

Assuming for the argument that it was necessary that the lessor should make a demand upon the lessee, that demand must necessarily have been for the performance of her covenant. The covenant in question was not for the redemption of property from a tax sale become irredeemable, but for the payment of—

> "in each and every year thereof the taxes, general and special, of every character and description, assessed against and levied upon the said premises by the authorities of the general or local government" (Rec. p. 14).

But the lessor could have made no such demand until she knew that there had been a breach of this covenant; and when she acquired this knowledge there could be no payment of the taxes involved, inasmuch as the default of which their non-payment was the occasion no longer admitted of removal by their payment.

Where a demand would be useless, it is not necessary.

Heard v. *Lodge*, 20 Pick. 53.
Wilstach v. *Hawkins*, 14 Ind. 541.

The only purpose of the demand would have been to give the tenant notice, but she had notice from the preceding July, and, according to the averment of her own bill, spent two months in disputing with Wiltsie whether she should pay $25, more or less, for redeeming the tax title in question (Rec. pp. 3, 4).

It is submitted, however, that the great preponderance of authority is to the effect that, even in the silence of

the lease upon the subject, notice and demand are not necessary.

The only reason why at common law demand for rent was required was a feudal one, and was based upon the extraordinary right of distress.

See *Davis* v. *Burrell et al.*, 10 C. B. 822; S. C. 70 Eng. Common Law Rep. 825, where it is said by Creswell, J.: "A demand is only necessary to justify a distress."

The English authorities are explicit upon this subject.

In 2 Platt on Leases, p. 333, the discussion of the subject is limited to demands for rent.

In the case of *Bracebridge* v. *Buckley* (*supra*), Thompson, C. B., and Graham, B, said that when a lessee, as in *Hill* v. *Barclay* (*supra*), had covenanted to make the necessary repairs within a certain time, no demand was necessary, and that a neglect of performance was tantamount to a refusal at law.

In the case of *Rolfe* v. *Harris* (*supra*), Sir Thomas Plumer said that no notice was necessary on a covenant to insure.

Sir T. Shadwick declared himself to the same effect in the case of *Green* v. *Bridges* (*supra*).

The following cases all hold explicitly that no demand is necessary:

Davis v. *Burrell et al.*, 10 C. B. 822 (*supra*).
Baldwin v. *Rees* (Ohio), 8 Am. Rec. 556 (see Appendix B).
Bacon v. *Park*, 19 Utah, 246.
Byrane v. *Rogers*, 8 Minn. 247.
Garner v. *Hannah*, 6 Duer, 262.

It is unnecessary to consider at length the absolute difference between default in payment of rent and in payment of taxes.

The lessor demands payment of rent because it is due to him. The taxes are not due to the lessor, but to the

taxing authority—a third party. Any demand by the lessor in this connection would necessarily be not for something to be done between the lessor and the lessee. It would simply be a demand that the lessee keep his covenant by paying taxes to a third party, no definite date, place, or amount of payment being named.

Of the cases cited by the appellee below in this connection, those of *Connor* v. *Bradley*, 1 How. 217; *Prout* v. *Roby*, 15 Wall. 471; *Allen* v. *Dent*, 72 Tenn. 676, 680; *McQuesten* v. *Morgan*, 34 N. H. 400, and *Bowman* v. *Foot*, 29 Conn. 331–341, are not cases involving default in payment of taxes, but default in payment of rent, and hence are entirely inapplicable.

In the case of *Jackson* v. *Harrison*, 17 Johnson, 66, decided in 1819, there is no citation of authority or discussion of principle; the court simply says, after holding that a demand is necessary for payment of rent before forfeiture:

> "The plaintiff equally fails in showing a right of reentry by reason of the fact that the defendant did not pay the United States tax, because the indispensably necessary step of making a demand of the defendant within the period required by law in order to create a forfeiture was not taken."

The facts of the case show that there was a default in paying some United States tax. The court here plainly confuses cases of default in payment of rent and in payment of taxes. It will appear from the argument of Drake, of counsel (p. 69), that this confusion pervaded the case. Counsel say:

> "There can be no pretense of maintaining this action under the statute. If it can be supported at all it must be at common law, and all the nicieties required in proceedings by the lessor must be observed. There must be a demand of the precise

> rent due on the precise day it was due, and payable at a convenient time before sunset upon the land and at the dwelling house, if there be any."

The facts show that the landlord himself paid the tax in order to prevent a tax sale.

This case was expressly disapproved in the year 1857 in the case of *Garner* v. *Hannah*, 6 Duer, 262. The point was elaborately considered by the court at pages 271–272, and the following language was used:

> "Where a forfeiture was claimed for the non-payment of rent, a demand of the rent must be shown unless the proceeding is under the statute; but taxes, as has been shown, form no part of the rent, they are not payable to the landlord nor on a day certain, and no demand could properly be made by the landlord of his tenant in respect thereto except to repay what the landlord had been compelled himself to pay by reason of his tenant's default; this would be a demand for reimbursement merely, whereas the default which works the forfeiture is the non-payment of taxes to the Government, and it is not perceived how a mere refusal to repay the amount expended by the landlord for taxes could work a forfeiture when no covenant of repayment is contained in the lease; if so, a demand of repayment can not be a necessary prerequisite to the right of action.
>
> "Besides, the payment of the taxes by the landlord, in case of the tenant's default, is not necessary to his right of action; that is complete on the breach of the tenant's covenant; a demand of their repayment by the tenant must therefore be unnecessary."

The case of *Jackson* v. *Harrison* is also disapproved in *Byrane* v. *Rogers*, 8 Minn. 247; the language of Flandrau, J., at page 251, is even stronger than that of the court in *Garner* v. *Hannah*, just cited.

In the case of *Kansas City Elevator Company* v.

Union Pacific Railroad Company, 3 McCreary, 463, the opinion was oral and was apparently a hasty one; Miller, J., said (p. 471), "I shall not be able today to deliver any but a very brief opinion." No argument of counsel on this point is reported, and no authorities are cited by the court. All that the court said upon the subject of taxes was :

> "In regard to taxes, the law is well settled, I think, that a demand for the payment thereof is necessary as a condition precedent to the right of entry."

In that case the elevator company leased of the railroad company a small parcel of land, and erected thereon elevator buildings and machinery. These had always been assessed as the personal property of the elevator company, and the taxes paid regularly. The leased ground had never been listed for taxation by the local assessors, but all the property of the railroad company in the county had been valued as an entirety for taxation by the State board, and no specific assessment of the ground leased to the elevator company had ever been made, nor had the latter ever paid any taxes on the ground or ever been requested so to do by the railroad. The demand in such case would practically be one for apportionment of taxes. The statement of the case does not show that any taxes were due; and the whole proceeding was an attempt on the part of the railroad company to summarily oust the elevator company from the leased premises, apparently without a pretense of right.

The only other case cited by the appellee was that of *Meni* v. *Rathbone*, 21 Ind. 454. It appears from the statement of facts in the opinion of the court (p. 460) as follows:

By the terms of the lease, the lessee agreed to pay all taxes of any kind; at a certain date the sum of $100 was

assessed as taxes against this property; neither the lessee nor any other person for her paid said taxes, and thereupon the property was sold to third persons, who received a certificate of purchase from the treasurer of the city. It does not at all appear that the certificate was irredeemable, and that the purchaser had acquired the right to receive a tax deed. The court say (p. 461):

> "It is conceded in appellant's brief that, as to the rent, the replies are (neither of them) specific enough in the averments as to time and place of demand thereof. But it is zealously contended that in regard to the taxes and assessments the replies are good; and quite a lengthy argument is presented to controvert the doctrine and conclusion of the courts in the cases of *Jackson* v. *Harrison*, 17 Johns. Rep. 63; *Bowman* v. *Foote*, Amer. Law Reg., April, 1862, p. 352; *Merrifield* v. *Cobleigh*, 4 Cush. 178."

It is sufficient to say here that the case of *Jackson* v. *Harrison* is the same one which has been under consideration, *supra*. The case of *Bowman* v. *Foote* is one that concerns solely the non-payment of rent; and the case of *Merrifield* v. *Cobleigh* is one which deals with neither, and is entirely irrelevant. So that the only authority upon which this Indiana case rests is that of *Jackson* v. *Harrison*. The court proceed (p. 462):

> "The right of a landlord to reenter, for breach of a condition subsequent, is not viewed with favor in the law; and where he claims that a forfeiture has occurred, and his right attacked, it devolves upon him to show that he has done everything that was required upon his part to perfect such right of reentry, rather than resort to an action for damages for a breach of such covenants. It is urged, that by the clause of the lease quoted the right of Wise to reenter, upon the failure of the lessee to pay taxes, is secured; and that without any previous act upon his part;

that, therefore, there was no affirmative act, precedent to this act of reentry, necessary upon the part of said Wise—such as demand that the taxes should be paid, or notice that he would reenter, if they were not so paid.

"In the form and order in which the reply set up the failure to pay the taxes, and the sale of the premises therefor, it would appear that the request made by Wise of Mary App, to pay said taxes, was made on the same day, but subsequent to said sale. If such a demand or request was necessary, it was not made of the right person. We are of opinion that such a request was necessary."

This Indiana case is not reasoned and cites no other authority than the New York decision of 1819.

It was insisted by the appellee in argument that the case above cited by the appellant of *Baldwin* v. *Rees*, was overruled by the subsequent case decided by the Circuit Court of Franklin County, Ohio, in 1895, of *Eichenlaub et al.* v. *Neil*, 3 Ohio Dec. 365. The court in this case, after reviewing a large number of decisions, say:

"A demand being necessary to forfeiture for non-payment of rent, we think it should be also for non-payment of taxes; but we are not satisfied that such is the law. The cases above referred to do not seem to be well considered (referring to most of the cases cited by the appellee on this point, and just by us considered). The statements are in the nature of *dicta*. No authorities are cited, and they can not be held to settle the question; nor do we think it necessary to pass upon it. The plaintiffs file their petition asking to be relieved from the forfeiture; and the matter we are to determine is whether they have made up a case entitling them to relief."

In this case there was no provision for reentry in case of the non-payment of taxes, but merely to indemnify

and save harmless the landlord against any loss, cost, damage, or expense sustained by the omission to punctually pay taxes, charges, duties, and assessments.

It also appeared from the facts of this case that the lessee or his assignee had made very valuable improvements upon the leased premises.

Bearing in mind the strictly feudal reason that existed for the doctrine of demand and notice at a certain place and hour, and of a certain person with respect to rent, it will be apparent that this reason has no application to a demand for the performance of a covenant to pay taxes or an insurance premium, or a thing of a similar nature. This is made very apparent by the reasoning of the New York court in the case cited of *Garner* v. *Hannah*, supra. The whole fabric rests upon the mistake of the New York court, in 1819, in the ill-considered case of *Jackson* v. *Harrison*, supra. As has been seen above, it would seem unreasonable to apply this rule to the case at bar, where the taxes have already been paid by Wiltsie, and the District of Columbia has no further claim against any one by reason of said taxes.

The discussion of this question is also relevant to the first, second, third, and fourth assignments of error.

QUESTION IV.

Where the Tenant Has Covenanted to Pay All Accruing Taxes Upon the Demised Premises, What, if Any, Duty Rests Upon the Landlord, as Between the Tenant and Himself, to Keep Watch Upon the Tenant's Possible Defaults and to Avoid Their Consequences?

As has been seen in the discussion of the question immediately preceding, a tenant who agrees to pay taxes thereby makes these taxes a personal debt of his own as between himself and his landlord.

> "The covenant of the defendant is affirmative and positive, not collateral or secondary in its terms. He covenants to '*bear, pay, and discharge all taxes and assessments,*' etc., as an obligation or debt of his own, and the language conveys no idea that the plaintiffs are first to bear and pay, before the demand becomes obligatory upon the defendants for payment. The covenant is broken when the defendant neglects to pay taxes or assessments duly imposed. The defendant is not at liberty to say that it is the debt of the plaintiffs; let them first pay it, and I will then pay them. It is his own debt, made so by the terms of his covenant."
>
> *Rector, etc.*, v. *Higgins* (*supra*).
> *Hand* v. *Suravitz*, 148 Pa. St. 207 (*supra*).

There can be no question that the covenant in this case is to pay the penalties as they become due. The language of the lease is—

> "pay or cause to be paid in each and every year thereof the taxes, general and special, of every character and description, assessed against and levied upon the said premises by the authorities of the general or local government" (Rec. p. 14).

When taxes become due is a point which has been well settled. In the case of *McFarlane* v. *Williams*, 107 Ill., p. 42, it is said that—

> "The taxes were to be paid when due; and this is fixed by law. They must be paid so as to avoid a sale of the property for their non-payment, or the enforcement of any personal liability against the lessor on account thereof."

In *Ricou* v. *Hart*, 47 La. Ann., p. 1373, it is said:

> "The taxes assumed as part of the consideration of the lease were due in September. On the 31st day of December the tax debtor who has not

> paid his taxes becomes a delinquent. The law provides 'from the day the tax-roll is filed in the Mortgage Office it shall be a lien on the property.' There was a penalty due from the 31st day of December. Without notice or demand, the taxpayer is in default from that date. He owes a penalty; and the taxes are secured by mortgage on his property. He places himself completely *in mora* by not paying the tax."

To the same effect are *Rector of Trinity Church* v. *Higgins*, 48 N. Y., page 532, and *Allen* v. *Dent*, 72 Tenn., page 680, from which case we quote the following language of the court (page 680):

> "The true construction of the contract is that such taxes shall be paid in the ordinary course of collection, and shall not become in any way a burden on the lessor."

Such being the case, on what principle of law is it to be said that it is the duty of the landlord in such case to anticipate the tenant's default, or to supervise him in the discharge of his covenanted duty, or to remedy his breach of covenant by positive action upon the lessor's own part and at his own expense? Unless there is some special bond existing between the parties, counsel know of no rule or principle of law which makes one a guardian of the other. The landlord is not trustee for the tenant; nor is he his guarantor; nor is there any relation either of nature or of contract existing between them which exempts either from the ordinary legal rules applying between man and man. A person injured by another's breach of contract must do no act to increase his damage. On the contrary, he must do every reasonable act to keep down his damage. And so also with a person injured by the tort of another. But apart from this principle, which can have no application here, is there any rule known to the law which imposes a duty upon

one man in connection with the breach of covenant of another, save where the doctrine of estoppel is involved?

The discussion of this question concerns the sixth assignment of error.

QUESTION V.

Do the Acts of the Landlord in Herself Paying These Taxes (She Collecting Them From the Tenant) Down to a Certain Date, Relieve the Tenant From Her Covenant to Pay Taxes Subsequently Accruing?

While the circumstance was not averred in the bills filed in this cause, it yet appeared from the evidence (Rec. pp. 119–125, 276–279), that, during the lifetime of the original lessee, the lessor herself paid those taxes and collected them from the lessee, H. King, Jr.

While undoubtedly this would have estopped the lessor from insisting upon this covenant to the prejudice of the lessee while she continued this line of conduct, nevertheless it can hardly be contended that the covenant itself was thereby destroyed, so that it could not have been revived by notice to the lessee of an intended change of conduct on the part of the lessor. Certainly it would bind the assignee of the lessee unless she bought with knowledge of the course of conduct of the lessor in this regard, and equally certainly it could be revived against the lessee by notice.

An instructive case in this connection is that of *Thompson* v. *Insurance Co.*, 104 U. S., p. 252. In that case relief was sought from the failure to pay an annual premium upon a life insurance policy. It was admitted that the premium had not been paid, but it was contended that payment had been waived by the taking of a note in payment of the premium. It was said that the

mere taking of the note was the waiver of the conditional forfeiture. The court, however, said (p. 257):

> "But in this case the policy does contain an express condition to be void if any note given in payment of premium should not be paid at maturity. We are of opinion, therefore, that whilst the primary condition of forfeiture for non-payment of the annual premium was waived by the acceptance of the notes, yet, that the secondary condition thereupon came into operation, by which the policy was to be void if the notes were not paid at maturity."

The additional excuse was set up that before the note fell due the insured became sick, and mentally and physically incapable of attending to business, until his death on the 3d day of November, 1874, and that the plaintiff was ignorant of the outstanding note. The court further said (p. 257):

> "In the second replication the excuse set up is, that before the note fell due Thompson became sick and mentally and physically incapable of attending to business until his death on the 3d day of November, 1874, and that the plaintiff was ignorant of the outstanding note. We have lately held, in the case of *Klein* v. *Insurance Company*, *supra*, p. 88, that sickness or incapacity is no ground for avoiding the forfeiture of a life policy, or for granting relief in equity against forfeiture. The rule may, in many cases, be a hard one; but it strictly follows, from the position, that the time of payment of premium is material in this contract, as was decided in the case of *New York Life Insurance Co.* v. *Statham*, 93 U. S. 24. Prompt payment and regular interest constitute the life and soul of the life insurance business; and the sentiment long prevailed that it could not be carried on without the ability to impose stringent conditions for delinquency. More liberal views have obtained on this subject in recent

years, and a wiser policy now often provides express modes of avoiding the odious result of forfeiture. The law, however, has not been changed, and, if a forfeiture is provided for in case of non-payment at the day, the courts can not grant relief against it. The insurer may waive it, or may, by his conduct, lose his right to enforce it; but that is all."

The third excuse set up, and the one which is especially relevant in this connection, is an alleged usage. In this connection the court say (p. 258):

"The third replication sets up a usage, on the part of the insurance company, of giving notice of the day of payment, and the reliance of the assured upon having such notice. This is no excuse for non-payment. The assured knew, or was bound to know, when his premiums became due. *Insurance Company* v. *Eggleston*, 96 U. S. 572, is cited in support of this replication. But, in that case, the customary notice relied on was a notice designating the agent to whom payment was to be made, without which the assured could not make it, though he had the money ready. As soon as he ascertained the proper agent he tendered payment in due form. It is obvious that the present case is very different from that. The reason why the insurance company gives notice to its members of the time of payment of premiums is to aid their memory and to stimulate them to prompt payment. The company is under no obligation to give such notice, and assumes no responsibility by giving it. The duty of the assured to pay at the day is the same, whether notice be given or not. Banks often give notice to their customers of the approaching maturity of their promissory notes or bills of exchange, but they are not obliged to give such notice, and their neglect to do it would furnish no excuse for non-payment at the day.

"The fourth replication sets up a parol agreement of defendant made on receiving the promis-

sory note, that the policy should not become void on the non-payment of the note alone at maturity, but was to become void at the instance and election of the defendant, which election had never been made. As this supposed agreement is in direct contradiction to the express terms of the policy and the note itself, it can not affect them, but is itself void. We did hold, in Eggleston's case, it is true, that any agreement, declaration, or course of action on the part of an insurance company, which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will estop the company from insisting upon the forfeiture. An insurance company may waive a forfeiture or may agree not to enforce a forfeiture; but a parol agreement, made at the time of issuing a policy, contradicting the terms of the policy itself, like any other parol agreement inconsistent with a written instrument made contemporary therewith, is void, and can not be set up to contradict the writing. So, in this case, a parol agreement supposed to be made at the time of giving and accepting the premium note can not be set up to contradict the express terms of the note itself, and of the policy under which it was taken.

"The last replication sets up and declares that it was the usage and custom of the defendants, practiced by them before and after the making of said note, not to demand punctual payment thereof at the day, but to give days of grace, to wit, for thirty days thereafter; and they had repeatedly so done with Thompson and others, which led Thompson to rely on such leniency in this case. This was a mere matter of voluntary indulgence on the part of the company, or, as the plaintiff herself calls it, an act of 'leniency.' It can not be justly construed as a permanent waiver of the clause of forfeiture, or as implying any agreement to waive it, or to continue the same indulgence for the time to come. As long as the assured continued in good health, it is not

> surprising, and should not be drawn to the company's prejudice, that they were willing to accept the premium after maturity, and waive the forfeiture which they might have insisted upon. This was for the mutual benefit of themselves and the assured at the time; and in each instance in which it happened it had respect only to that particular instance, without involving any waiver of the terms of the contract in reference to their future conduct. The assured had no right, without some agreement to that effect, to rest on such voluntary indulgence shown on one occasion, or on a number of occasions, as a ground for claiming it on all occasions. If it were otherwise, an insurance company could never waive a forfeiture on occasion of a particular lapse without endangering its right to enforce it on occasion of a subsequent lapse. Such a consequence would be injurious to them and injurious to the public."

The obligation to pay these taxes is created by the most solemn form of agreement known to the law, a formal covenant. The law does not permit such an agreement to be changed by the mere acts of the parties *in pais*. An instructive case in this connection is that of *Oldewurtel* v. *Wiesenfeld*, decided in 1903 by the Court of Appeals of Maryland (97 Md., p. 165). The pertinent facts in that case were these: The lease under discussion was executed for a term of years, and subsequently the lessor agreed by parol that the rent should be reduced for a period of six months. The lessee subsequently paid the rent as reserved in the original lease, the lessor making a deduction from the total as verbally agreed upon. In an action of covenant to recover the rent accruing thereafter, it was held that there had been no such waiver or alteration of the original lease as to defeat the lessor's right to sue in covenant. It was strongly urged that the specialty in that case had been altered by parol and, therefore, the whole contract had become a simple

one and the original covenant had been waived. The court, however, held (p. 173) that:

> "The mere credit or reduction of the rent for six months to the extent of $10 a month, when the defendant, at the end of the six months, paid the rental reserved in the lease, and continued in possession according to the terms of the lease, without a new agreement, can hardly be held to be such a waiver, alteration, or abandonment of the lease as to defeat the action in this case."

Mrs. Kennedy's (the lessor) conduct in herself paying the taxes and then having the lessee refund them to her was at the most a gratuitous act of favor on her part, for which she received no consideration. It still remained the lessee's covenant duty to herself in the first instance pay these taxes when due to the corporate authority. This line of conduct on the lessor's part did not divest her of her right to at any time require the lessee to literally perform her covenant. After the original lessee's death, Mrs. Kennedy pointedly, in December, 1897, told the assignee's son, Joseph King, who communicated this information to the assignee's financial manager, Harry King, that she had forgotten to notify that the taxes were due and asked to have them paid; that this action of hers was thoroughly understood is shown by the fact that, without any further action on her part, Harry King sent in July, 1900, and again in May, 1901, to perform, too late, his covenant duty.

This is so important that it must be referred to more in detail.

It can not be said that either the nominal complainant, Caroline King, or the real complainant, Harry King, was in anywise misled by the conduct of Mrs. Kennedy in herself paying the taxes and receiving a reimbursement for such payments from the original lessee, H. King, Jr. As has been said, the

original lessee died on the 15th day of August, 1897. An instalment of the taxes due on June 1, 1898, became payable in November. The testimony of Joseph King (Rec. p. 154), is to the effect that a couple of days before Christmas, 1897, Mrs. Kennedy said to him that "she had neglected to notify us (the Kings) in reference to the taxes, and if we wouldn't have them paid, and I said I would go up and tell my brother and notify him at once; that she needn't worry, it would be attended to."

Q. Did you notify your brother?

A. Yes, sir; I went that night and told my brother, Mr. Harry King.

Q. That is the only occasion you recall that she discussed taxes with you?

A. Yes, sir.

Turning to the testimony of Harry King in this connection, we find the following (Rec. pp. 187, 188):

Q. You say you were the administrator? A. Yes sir.

Q. Your father left no will? A. Yes, sir; he did.

Q. Then you were his executor? A. No, sir; I was administrator with the will annexed. My mother was unable to attend to it.

Q. Then it was you, who, under the order of the court, sold this lease to your mother? A. The lease and stock; yes, sir.

Q. You knew what was in the lease, I suppose? A. No, sir; I did not.

Q. Did your mother know what was in the lease? A. No, sir.

Q. You sold and she bought without knowing what the lease was? A. Yes.

Q. Did you, in point of fact, know or did your mother know, to your knowledge, that according to the lease the lessee was bound to pay the taxes? A. We knew it from the fact that we had paid the taxes before.

Q. You knew when taxes accrued in May and

November of each year as a rule, although there had been exceptions, did you not? A. Yes, sir.

Q. When November of 1897 came around you did not receive any notification from Mrs. Kennedy about taxes? A. No, sir.

Q. But you say you learned in December of that same year, shortly before Christmas, that she had neglected to give you notice? A. Yes, sir; but she did not give that message to me. She gave it to my brother, and my brother, in turn, gave it to me.

Q. Did you inform your mother of it? A. Yes, sir.

Q. And thereupon the tax was paid? A. I don't know whether I informed my mother or not. I can not recall that I did, because I did not tax my mother with business concerns. I attended to it myself. It is most likely I did not tell her.

Q. At any rate you knew it? A. Yes, sir.

Q. You were manager of her business also, were you? A. Yes, sir.

Q. In point of fact you conducted her business for her, did you not? A. Yes, sir.

Q. As you had done for your father during the last years of his life? A. Yes, sir.

Q. Your mother did not take any active part in the financiering and management of it at all; did she? A. No, sir.

Q. So that really you were the manager? A. Yes, sir.

Q. And you had it pointedly brought to your attention in December of 1897 that taxes had been due the preceding November that you were bound to pay and which had not been paid? A. Yes, sir.

Q. When May came around what did you do? A. I did not do anything. I had not charged my mind with it at all.

Q. You knew you were to keep these taxes paid? A. Yes, sir.

Q. You knew the taxes were levied annually against the premises? A. Yes, sir.

Q. You knew they were payable twice a year? A. Yes, sir.

Q. When November, 1898, came around what did you do about these taxes? A. I did not do anything for the same reason I stated before.

Q. When May, 1899, came around, what did you do about these taxes? A. Nothing, for the same reason.

Q. When November, 1899, came around, what did you do about these taxes? A. Nothing.

Q. When May, 1900, came around, what did you do about these taxes? A. Nothing at all.

Q. Now, Mr King, I ask you again, for the sake of having no possible mistake about it, if you are certain that you received no letter from Mrs. Kennedy with respect to these taxes down to May, 1900? A. Yes, sir; sure.

Q. You are certain of that? A. Positive.

Q. And no verbal demand of any sort? A. No sir.

It is apparent from the foregoing testimony that the taxes on the property in question here were not paid from December, 1897, until July, 1900, not by reason of any mental distress on the part of the financial manager, Harry King, or from any lack of knowledge on his part that the lessee was bound to pay them, or from any misconception that Mrs. Kennedy expected to pay them herself and have the lessee reimburse her, as she had done in the lifetime of the original lessee. He knew well that she expected them to be paid directly by the assignee of the lease.

This is also apparent from his conduct when Wiltsie (the purchaser of the tax title) wrote to him on July 24, 1901.

Although this matter will be referred to again under the head of *Laches*, it is so important in this connection that it must be given in detail here.

This letter will be found at page 285 of the record. It is as follows:

ROCHESTER, N. Y., *July 24, 1901.*

MRS. CAROLINE KING.

DEAR MADAM: At the tax sale held in April, 1899, at the District building, Washington, D. C., by the collector of taxes, there *was* sold to me the lands and premises described as sublot A, square 432, assessed in the name of Maria T. Gillis.

The right to make redemption through the office of the collector of taxes, expired last April, and settlement must now be made directly with me. I am willing to surrender the tax certificate and to cancel my claim upon a very reasonable basis, *if you give the matter immediate attention.* Delay will increase the charges against you.

I paid for the certificate in April, 1899..	$143 83
There is to be added interest at the statutory rate of 15% per annum, from April, 1899, to date of payment, 2 years and 4 months.....	$
Charge for releasing which I will state definitely as soon as I know that you are the owner, or otherwise interested	$
Total.....	$

Immediate payment and settlement should be made. I am now entitled to a deed to the property; but I will surrender the tax certificate without obtaining a deed, if you will give this matter immediate attention. Delay will be entirely at your own risk.

If I do not hear from you *within ten days*, I shall conclude that you have no interest in the property and have abandoned it, and shall consider myself at liberty to take title to the property by deed.

Answer at once by enclosed envelope. *This notice is sent only as an act of courtesy.*

Respectfully yours. C. H. WILTSIE.

P. S.—I am informed that you are interested in the premises as owner or mortgagee. If I am wrongly informed, *I shall esteem it a favor if you will kindly state that fact and give me the name and address of some interested party.*

A reply was made to this July 30 (Rec. p. 173), as follows:

WASHINGTON, D. C., *July 30, 1901.*

Mr. CHARLES H. WILTSIE, *Rochester, N. Y.*

DEAR SIR: We are in receipt of your communication in reference to sublot A, square 432, assessed in the name of Maria T. Gillis, and in reply will say that we are willing to pay a reasonable amount for the redemption of same.

Please advise us and oblige.

H. KING, JR.

Copy.

Thereupon, on August 1, Wiltsie replied as follows (Rec. p. 174):

August 1, 1901.

H. KING, JR., *810 7th street, N. W., Washington, D. C.*

DEAR SIR: Your letter of July 30, with reference to tax certificate against sublot A, square 432, in the name of Maria T. Gillis, has been duly received. I will assign or surrender this certificate upon the following computation:

Face of certificate	$143 83
Recorder's fee	10
Aggregate	$143 93
Interest two years, four months, at 15 per cent	50 38
Charge for releasing	100 00
Total	$294 31

Please send New York draft or postal money order and I will send the tax certificate directly to you; or, if you prefer, notify me as soon as you are ready to make payment and the certificate will be sent to the Central National Bank of Washington, which is my fiscal agent, where the papers will be open to examination and payment can be made. The papers will be duly released and also assigned in blank, so that any name can be inserted.

Respectfully yours,

G. E. R. KLEIN, *Clerk.*

In correspondence please refer to serial 909 Wash. 99.

Send only N. Y. exchange or postal money order. Local checks subject to collection charges.

909–Wash.–99.

WASHINGTON, D. C., *Aug. 10, 1901.*

CHAS. H. WILTSIE, *Rochester, N. Y.*

DEAR SIR: In reply to yours of 1st inst., 909 Wash. 99, we beg to say that our Mr. Harry King is out of town at present. On his return next Monday we will lay your letter before him for reply.

Truly, H. KING, JR.

Copy. R. W.

On September 17, Wiltsie's clerk wrote again as follows (Rec. p. 175):

909–Wash.–99.

September 17, 1901.

H. KING, JR., *810 7th St., N. W., Washington, D. C.*

DEAR SIR: I write to call your attention to the delinquent tax sale certificate which I hold against sublot A, square 432, in the name of Maria T. Gillis, and to ask when same is to be taken care of. In your letter of August 10, you stated that Mr. Harry King would give this matter attention upon his return the following week. I have heard nothing further with reference to the matter, and I shall esteem it a favor if you will write me by

return mail stating when this matter is to have attention. I am desirous that the certificate should be taken up at an early date.

Very respectfully yours,

N. E. R. KLEIN, *Clerk.*

In correspondence please refer to serial 909–Wash.–99.

In reply to this the witness, Harry King, wrote as follows (Rec. pp. 55, 56):

WASHINGTON, D. C., *Sept. 21, 1901.*

Mr. CHARLES H. WILTSIE, *Rochester, N. Y.*

DEAR SIR: I have just returned to the city, having been away for a considerable length of time, and in reply to your communication will say that we are desirous of taking up the certificate that you have, but the $100.00 redemption is very large. In view of the fact that the penalties on this property are heavy and the amount for which it was sold was very small, I think that a redemption of $50.00 would be about just and equitable. I hardly think it is your desire to squeeze us or to be unreasonable. *Unfortunately we have paid you quite a considerable amount of money in the past for tax sales.* We are not interested in this piece of property in any way except as tenant, as we are not the owners or the mortgagees. If it should meet with your approval send us a bill and we will send check.

Respectfully yours, HARRY KING.

Dict. H. K.

Thereupon, on the 24th of September, 1901, Wiltsie's clerk replied as follows (Rec. pp. 175–176):

909–Wash.–99.

Sept. 24, 1901.

HARRY KING, *812 7th St. N. W., Washington, D. C.*

DEAR SIR: Your letter of September 21st addressed to Mr. Wiltsie with reference to the redemption of the delinquent tax sale certificate

which he holds against sublot A, square 432, assessed in the name of Maria T. Gillis, has been duly received. You state that you think the charge for the release of this certificate is too much. Mr. Wiltsie is absent from his office and I have no authority to make any concessions on such certificates, but if you will take up this matter promptly I will assume the responsibility of accepting $75 for the release of this certificate. There is now two years six months' interest due and I make a computation on this basis as follows:

Face of certificate	$143 83
Recorder's fee	10
Aggregate	$143 93
Interest two years six months at 15 per cent	53 97
Charge for releasing	75 00
Total	$272 90

Believing that you will accept this offer, I have today sent these papers to the Central National Bank of Washington, with receipt on you for $272.90, where they will be open to your examination, and payment can be made. Please call at the bank upon receipt of this letter and take up the papers promptly.

Very respectfully yours,

E. J. WATSON,
Mang. Clerk.

Dic. (E. J. W. /N.)

The witness Harry King is asked by his counsel (Rec. p. 176), as follows:

Q. Do you recall whether you replied to the letter of September 24?

A. I can not say that I did.

Q. What is the next thing that occurred with regard to this Wiltsie tax purchase?

A. I received a letter from Mrs. Kennedy informing me that the lease had been forfeited.

This letter (Ex. C. to bill, Rec. p. 201) is dated October 1, 1901, and notifies Mrs. King that by reason of her neglect to pay the taxes her (Mrs. Kennedy's) property had been twice sold at tax sale, and that she declined to receive any further rental from her (Mrs. King) by reason of the lease being thus vitiated.

It appears from the testimony of the witness Harry King (Rec. p. 178), that as soon as he received this letter from Mrs. Kennedy he had a certified check drawn up for the amount of the taxes, with the penalty, bonus, and interest. He went over with the certified check to the Central National Bank, and there learned that the tax certificate had been recalled by Wiltsie on the afternoon of the preceding day (Rec. p. 179). On the next day he had a conversation with Webb (Rec. p. 180); and then, on the advice of Mr. Tobriner, telegraphed to Wiltsie (Rec. p. 181) as follows:

October 2, 1901.

CHARLES H. WILTSIE, *820 Powers Bldg., Rochester, N. Y.*

Called at bank. Find certificate recalled. Have mailed certified check. Send me certificate. Answer my expense.

HARRY KING.

That he then went back to his store and immediately had a letter written, and mailed a certified check to Mr. Wiltsie at Rochester; that he received the following telegraphic reply (Rec. p. 181):

ROCHESTER, N. Y., *Oct. 2, 1901.*

To HARRY KING, *812 Seventh St. N. W.*

Certificate redeemed. Check will be returned.

E. J. WATSON,
Mg. Clerk.

That he subsequently received the following letter from the said Watson:

CHARLES H. WILTSIE, Attorney and Counsellor,
820 Powers Bldg., Rochester, N. Y.
October 3, 1901.

DEAR SIR: Your letter of October 2, enclosing certified check payable to Mr. Wiltsie's order for $272.90, has been duly received. Your telegram was received yesterday and I also telegraphed you in reply, stating that this certificate had been redeemed and that I would return your check. I herewith return this check as we do not hold the certificate any longer.

Respectfully yours, E. J. WATSON,
Mang. Clerk.

That he then sent Mr. Wiltsie another telegram, as follows:

Oct. 3, 1901.

To CHARLES H. WILTSIE, *820 Powers Bldg., Rochester, N. Y.*

Wire at my expense name of party who has redeemed Maria T. Gillis' certificate.

HARRY KING.

To which he received no reply; and this ended the correspondence with Wiltsie.

As a matter of fact Harry King did not pay the taxes or any of them. He was not misled in this regard, as has already been shown, by any one. It was merely negligence, or financial inability to pay.

He admits that he voluntarily and without notice from Mrs. Kennedy or any one sent in July, 1900, to pay them. He did so because he then recollected or chose to take up a neglected duty. Again, he sent to pay them in May, 1901. Why? No one had asked him to.

He did not pay taxes on back parts of demised premises.

When he became the assignee of this lease he was bound at his peril to find out the extent and application

of the lessee's covenants and to perform them. He has not done so.

The promptness and alacrity with which King attempted to take up the tax sale certificate after receiving Mrs. Kennedy's notice of forfeiture, the extraordinary efforts by telegraph and mail, and the sending of certified check for the amount are in striking contrast with the utter indifference and practical refusal to redeem shown between July 24, when notified by Wiltsie, and the 1st of October. It is an entirely just, if not conclusive, inference from the evidence that if the Kings could have kept Wiltsie at bay they would have left the tax sale unredeemed to the end of the lease and then walked out of the premises and left Mrs. Kennedy to settle with Wiltsie as best she could.

It is most significant and inexcusable that Mrs. Kennedy and her counsel, Webb, were kept in ignorance of all of these circumstances so vital to her interests.

It is not pretended that Harry King or any one gave her any notice of them until a stranger, Knight, for purposes of his own not at all connected with any party in interest, called Kann's attention in September, 1901, to the fact of the irredeemable tax sale (Rec. pp. 4, 286, 447, 448).

We submit that this question must also be answered in the negative.

The discussion of this question concerns the sixth and seventh assignments of error.

QUESTION VI.

What Diligence Must a Complainant Show who Applies to a Court of Equity for Relief Against a Forfeiture Declared by the Landlord on Account of Such a Breach?

All statutes of limitations are founded upon the maxim *Vigilantibus non dormientibus jura subveniunt.* While this is a legal maxim it is especially potent in a

court of equity. Its application is made the subject of Section VIII, Chapter First, Part Second, of the last edition of Pomeroy's Treatise on Equity Jurisprudence. The learned author quotes with approval Lord Chancellor Camden's words in the case of *Smith* v. *Clay*, 3 Brown's Ch. 638, as follows: "*Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence.*" This is not, of course, merely diligence in seeking a legal remedy. It comes, as Pomeroy says (sec. 418) under the larger maxim: *He who seeks equity must do equity.*

How little diligent in the premises the complainant has been appears from the testimony next hereinbefore quoted, showing that she not only neglected her covenant duty for more than two years, but also was most negligent in attempting to repair, as far as she could, the very dangerous consequences of that prior negligence.

The discussion of this question concerns the seventh assignment of error.

QUESTION VII.

Where the Tenant Has Not Only Allowed the Demised Premises to be Sold for Taxes, but Has Continued His Breach Until a Tax Deed for the Demised Premises Has Issued to an Assignee of the Purchaser, Can the Tenant Litigate the Question of the Validity of That Tax Sale with the Holder of the Tax Title at the Risk of the Landlord?

As will presently be shown more in detail, when the landlord learned that her land had been sold for taxes, and that an irredeemable tax title thereto had been acquired by a third party, she entered into negotiations with the defendants Kann through the defendant Cohen looking to a lease of the premises in question to them. They agreed

to pay $1,200 more of annual rental than the complainant was paying. This was satisfactory to Webb, acting for Mrs. Kennedy, and, thereupon, the letter (Rec. p. 20) was written forfeiting the lease. Thereupon, after certain occurrences and interviews, which will be recurred to, this bill was filed by the tenant, to hold, by injunction, the landlord's hands, while the tenant litigated, at the landlord's risk, the question of the validity of the tax title in question with the Kanns, who had bought it through Cohen.

Counsel do not understand that there is any rule of law which prevents a landlord and tenant from agreeing that as between themselves what is ordinarily a primary duty of the landlord shall become a primary duty of the tenant; that after such agreement has been made the landlord is under an obligation to constitute himself the guardian of the tenant and to overlook under some indefinite penalty the conduct of the tenant in observing or failing to observe that tenant's own agreement. We do not understand that where a tenant has covenanted to pay taxes and has failed to do so and the demised property has been sold for taxes, it lies in the tenant's mouth to say to the landlord that he ought to have been on the lookout for the tenant's violation of his covenant, nor can we understand that when the landlord endeavors to regain possession of the premises it again lies in the tenant's mouth to say to him: "True, I got these premises from you; true, I have allowed a tax deed for them to be given to a third person; true, if you can get possession of them from me you may be able to compromise this tax title with this third person, but I intend to resist your claim to recover possession and to deprive you of the chance to retrieve the disaster which I have brought upon you, because this tax title may be valid and, therefore, you can not legally recover the possession which you gave me of premises formerly your own."

Counsel, speaking with all deference and respect, can not conceive this to be the law.

In the case of *Bacon* v. *Park*, 19 Utah R., p. 46, *supra*, the following language, used by Baskin, J., is very pertinent:

> "By the covenants of the lease of said premises, in case of default the lessor was authorized to re-enter without notice and forfeit the lease. It required no accounting to fix the amount of said taxes. The plaintiff, by going to the treasurer's office, could have ascertained the amount; and if he intended to keep the covenants of the lease it was his duty to do so, and, when ascertained, to pay the amount, without applying to the defendant Park (lessor) for such information. He knew that the premises had been sold for delinquent taxes, and that the time for redemption would soon expire, and that if the redemption was not made that Hamilton Park's title to the premises would be defeated."

The following language of the court is also especially relevant, in view of the fact, admitted upon the face of the bills in this case that after the lessee knew not only that the property had been sold for taxes, which she had covenanted to pay, but that that sale had ripened into a deed and was irredeemable, she still, when possessed of such knowledge, wasted weeks in a negotiation with the holder of the tax title, endeavoring to obtain better terms from him:

> "The plaintiff (lessee) was aware of the covenants in the lease relating to forfeiture. He knew that default had been made in the payment of taxes for several years (the deficit for taxes amounting to about four thousand dollars), and that the premises had been sold for the non-payment of the same, and that the time to redeem had nearly expired; yet he did not intend to redeem until the last day. Such intention and such

> delay was a gross violation of the covenants of the lease. The evidence shows that Mr. Park (the owner of the premises) was in straitened circumstances. His property was in danger of being sacrificed for the non-payment of taxes. *By forfeiting the lease he ascertained that he could raise the money necessary to redeem the property by re-leasing the same. It would have been reckless on his part to let such an opportunity pass, and it was absurd for the plaintiff to expect that the lessor would not assert his right of forfeiture for the non-payment of taxes until the last day for redemption of the same from the tax sale.* Equity will not relieve against a forfeiture of a lease where the breach of the covenants has been so culpable, long persisted in, and detrimental as the evidence in this case shows the breaches to have been."

Yet, in the case at bar the Court of Appeals decided that the landlord's hands must be tied by the law while reaching out to protect herself from the tenant's breach of covenant. Not only that, but the landlord must be deprived by the law of the benefit of a negotiation with the Kanns to save her property while the tenant is permitted to fight the Kanns at the risk of the landlord with respect to the validity of a tax title incurred by the tenant's breach of covenant.

But the Court of Appeals go to a still greater length and say (21 App. D. C. p. 152):

> "It is true that in this case a tax deed has actually been issued, and the ultimate mischief has apparently been done. *But the position of the appellant (Webb) in regard to this does not seem to be entirely consistent. Either this tax deed is valid or it is invalid. If it is valid, then the appellant's title to the property is gone, and he has no right to enter and dispossess the lessee.*"

That is to say, the defaulting tenant, who has done all the mischief, can defy the landlord, from whom he received possession, and can thus prevent the landlord from regaining possession and with it saving himself from the ruin brought upon him by the tenant, on the ground that the landlord has lost title and right of possession through the tenant's own act.

With great respect for the Court of Appeals it is urged that this can not be law.

This question concerns assignment of error numbered seven.

QUESTION VIII.

Is Not a Bill in Equity Which Attempts to Enjoin the Enforcement of a Forfeiture Declared by the Landlord by Reason of Such a Breach, and Also to Adjudicate the Validity of Such Tax Sale, Multifarious?

It is not easy to reconcile the decisions of the Supreme Court of the United States upon this point.

What is or is not multifarious is, it seems, a question to be determined in each particular case. It is stated by Judge Story, Section 271 of Story's Equity Pleading, that:

> "By multifariousness in a bill is meant the improperly joining in one bill distinct and independent matters, and thereby confounding them; as, for example, the uniting in one bill of several matters, perfectly distinct and unconnected, against one defendant, or the demand of several matters of a distinct and independent nature against several defendants in the same bill. In the latter case, the proceeding would be oppressive, because it would tend to load each defendant with an unnecessary burden of costs, by swelling the pleadings with the statement of the several claims of the other defendants with which he has no

> connection. In the former case, the defendant would be compellable to unite, in his answer and defense, different matters, wholly unconnected with each other; and thus the proofs, applicable to each, would be apt to be confounded with each other, and great delays would be occasioned by waiting for the proofs respecting one of the matters, when the others might be fully ripe for hearing. Indeed, courts of equity, in cases of this sort, are anxious to preserve some analogy to the comparative simplicity of proceedings at the common law, and thus to prevent confusion in their own pleadings, as well as in their own decrees."

Testing these bills by these general principles, we find that the case made against the lessor concerns only herself and the complainant. Whether or not the lessee has forfeited her lease is a question that in no wise concerns any other party to these proceedings.

Turning now to the averments of the bill respecting Cohen and the Kanns, the contention between them and the lessor and owner is something that the complainant has nothing to do with. Whether or not through the complainant's default Cohen and the Kanns have obtained a valid title to the lessor's property is a question that the complainant can not litigate, and with which she is not legally concerned. It is a question which she can not force the lessor to raise or to contest. She has no title upon which the tax deed in question can be a cloud. If the Kanns or any one claiming under this tax deed were to attempt to dispossess her tomorrow morning, she could make her defense in ejectment; but that is all she could do. If the lessor chose to abandon the property to the claimant under the tax deed the complainant could not prevent her doing so. A court of equity has no jurisdiction to compel the lessor to litigate with the holder of a tax title. It has no power to enable the complainant to so litigate. The complainant's

alleged right is merely a possessory one, and is personal property only. She is not in a position, and can not be put by the court in a position, to litigate the question of the validity of this tax title.

It is therefore submitted that the complainant's bill is multifarious, in that while it should be a bill against Webb only, and for the canceling of a forfeiture only, it is a bill for those purposes and also for the purpose of litigating the validity of a tax title as between the complainant and the holders of that title, which can not be done.

It is not necessary to consider the long line of Supreme Court cases which were cited by counsel upon the other side in argument below, because it will, of course, have to be conceded that the bills referred to in those cases were not multifarious. It will be found, however, upon an examination of them, that not one of them justifies such a joinder of parties and of subject-matter as is here attempted.

The discussion of this question involves the eighth assignment of error.

QUESTION IX.

Was Not the Lease in Question Procured Under Such Circumstances (Disclosed by the Evidence) as Will Induce a Court of Equity to Look Unfavorably Upon It?

While the exact age of Mrs. Kennedy was not given in testimony, nevertheless her extreme age and fatal illness abundantly appear from the proceedings.

On page 22 of the record Mr. Webb says, in a letter to Messrs. Darlington and Tobriner:

> "I beg to advise you that I am and have been for some time the counsel of Mrs. Kennedy,who is a very aged woman, and I have to request that any future communications with reference to her business be addressed to me."

In answer to this letter (Rec. p. 22), Messrs. Darlington and Tobriner wrote:

> "But inasmuch as Mrs. Kennedy is a woman of advanced years, in a question of notice and serving of process which may hereafter become material, it might be well for your own as well as for our protection that you have Mrs. Kennedy advise us that you are authorized to accept all notices to her and service of process against her."

Finally, at page 411, Mr. Darlington, upon the cross-examination of the defendant Cohen, asked these questions:

> "Q. You knew Mrs. Kennedy? A. Yes, sir. Q. You knew she was a very old lady in frail health? A. Yes, sir. Q. And that her physician thought this litigation would be dangerous to her life and health? A. Which litigation? Q. Litigation over this tax title, this tax sale, this forfeiture. A. Not necessarily that litigation. Q. What litigation would do so? A. Dr. Fry said his patient was liable to be seriously affected in her health if litigation should ensue."

Mrs. Kennedy, in fact, did die upon the 4th day of December, 1901 (allegation of bill of revivor, Rec. p. 26).

A not insignificant fact in this connection is furnished by the renewals of the lease in question. The original lease (Rec. pp. 3–16) was made on the 8th day of July, 1890, when Mrs. Kennedy, assuming her to have been 80 years of age at the time of her death in 1901, was 69 years of age. It created a term of three years ending on October 1, 1893. On the 27th day of December, 1892, this lease was extended for five years, which would bring it up to October 1, 1898. On the 8th day of October, 1896, it was extended for five years with an option of five more years, which was interpreted by all parties as an additional extension for ten years, thus

bringing the term up to the 1st day of October, 1908. It is admitted in the original bill (Rec. p. 5) that the rental value of the demised premises has somewhat increased since the time said lease was entered into. The rent reserved was twenty-four hundred dollars per year and the taxes and repairs, which amount to about two hundred and ninety dollars per year (Rec. pp. 333, 334). This would make an annual rental of about twenty-seven hundred dollars in round numbers.

There is no direct evidence of the value of the premises in question or of the lease thereupon. In the original bill of the plaintiff (Rec. p. 3) this property is said to be "worth a large sum of money, to wit, not less than fifty thousand ($50,000) dollars." In the answer of the defendant Webb (Rec. p. 84), it is said:

> "This defendant is not able to state whether the amount of said estate will largely exceed in value the amount of said legacies" (about $40,000).

At page 432 of the record the defendant Webb, in his testimony, answered the question:

> "Q. What led you to fix the sum of $70,000 for the proposed bond? A. I figured up that $3,600 which the Kanns offered to pay was 5 per cent of $72,000. I consequently settled on $70,000 for that reason."

Upon recurring to the lease in question (Rec. p. 14) it will be seen that the lessee was not only bound to pay taxes, but also to repair the demised premises. Under the lease the yearly rental amounted to $2,400, the taxes amounted to about $290, and the repairs would hardly be less than $300, so that the tenant under this lease paid in round numbers a yearly rental of $3,000. For

many years in this District it has been a matter of common knowledge that landlords are fortunate who are able to realize a net return of 5 per cent upon rented real estate. According to that computation the premises in question would be worth $60,000. Now it is in evidence that the Kanns in the early part of 1901 were willing to take this lease at an increased rental of $1,200, and also to pay all taxes and improvements (Rec. p. 305). Applying the same computation, we have $4,190 as the annual rental which the Kanns were willing to pay, which would be 5 per cent of $83,800, Recurring to the last renewal of the lease for ten years (Rec. p. 16), it will be seen that it was made on the 8th day of October, 1896, and was, as has been said, to expire on the 1st day of October, 1908. It is submitted that this last extension was so obviously unfavorable to Mrs. Kennedy's business interests that her agreement to such a term for the rental reserved is a persuasive argument as to her inability, even at that time, to properly protect her own interests as against parties who were certainly competent to protect their own interests.

It is not said or intended to be said that she was unable to make a valid deed or contract. What is meant is that she was in a position to be taken advantage of, and that advantage was in fact taken of her.

If this were a case of specific performance the court would judge of the fairness of this lease.

In judging of the fairness of a contract, the court will look not merely at the terms of the contract itself.

Upon this subject Fry says in his book on Specific Performance, sec. 380, as follows:

> "In judging of the fairness of a contract, the court will look not merely at the terms of the contract itself, but at all the surrounding circumstances, such as the mental incapacity of the parties, though falling short of insanity, *their age*,

> or poverty, the manner in which the contract was executed, the circumstances that the parties were acting without a solicitor, that the property was reversionary, or that the price was not the full value."

Where a young man, just arrived at his majority, contracted for the purchase of land, after an examination utterly insufficient to ascertain its value, with a person who was more than a match for him, from his want of sagacity, experience, and advice, and who described the advantages of the purchase in exaggerated terms, for a grossly inadequate price, the court refused to decree specific performance against him, although there was no fraud nor [illegible]ral incapacity to contract on his part.

G[illegible]. Small, 2 Strobh's Eq. 72.

Again, at section 382, the same author says:

> "It is enough, generally speaking, to induce the court to refuse performance, that there are any circumstances about the making of the contract which render it not fair and honest to call for its execution; it is not needful that there was any intentional unfairness or dishonesty at the time."

While these are cases of specific performance which are referred to, nevertheless the principle applies with even greater force to cases of relief from forfeiture. Where an experienced business man has made an unfair bargain with an old woman, a court of equity will not help him to keep her under the burden when he has negligently allowed it to slip off her shoulders, and she has become free.

The discussion of this question involves the first, second, third, and fourth assignments of error.

QUESTION X.

Do the Pleadings and the Evidence Disclose Any Case of Fraud on the Part of the Defendant or of Accident or Mistake on the Part of the Complainant Which Would Constitute a Ground of Equitable Relief?

The consideration of this question requires a somewhat detailed statement of the testimony.

The original lessee, Harry King, Jr., died August 15, 1897 (Rec. p. 165).

Upon his death his affairs were found to be very much embarrassed. This is set forth in the original bill and is insisted upon in the testimony of the witness, Harry King, as follows (Rec. p. 185):

> "Q. How soon after your father's death was it that his estate became involved in litigation? A. In actual litigation? Q. Yes. A. I should suppose that it was a year afterwards that it was involved in actual litigation; but our creditors had been pressing for their money ever since my father's death. Q. From the time of your father's death you were very much involved? A. Yes, sir."

On the 25th of August, 1897, it appears that the said Harry King, who had been appointed administrator c. t. a. of the estate of his father, Harry King, Jr., filed a petition in the Orphans' Court, which petition the court is asked to read in full. It will be found at pages 208 and 209 of the record. The first paragraph of the said petition avers that the stock in trade and fixtures in stores numbered 812 and 814 Seventh street and 715 Market space (the last number being the premises in question), and also certain horses and wagons and harness used in connection with the said stores, have been appraised by the official appraisers of the Orphans' Court at the sum of $3,315. The second paragraph of said petition

sets forth the substance of the leases of premises situate at 812 and 814 Seventh street and 715 Market space. The third paragraph of the said petition is as follows:

> "The petitioner further represents that he has requested the said appraisers to place a value upon the said several leasehold interests, but that the said appraisers refuse to do so, claiming that the rent reserved by the said several leases is larger and greater than what the said premises would at the present time rent for under a new lease; and your petitioner believes that such is the case and that the said leasehold interests are of no practical value as an asset of the said real estate."

The petitioner then sets forth an offer of $3,500 cash from the widow, Caroline King, for the purchase "of the said stock in trade and fixtures and said leasehold interests." The petitioner adds—

> "that he feels satisfied, from his intimate acquaintance with the character of said stock, having been many years engaged in the millinery business, that nothing like its assessed value can in any other manner be realized."

The petition concluded with a prayer that private sale of the above assets for a sum not less than their appraised value be authorized by the court. This petition was prepared by Mr. Tobriner (Rec. p. 42), and sale as asked for was in fact made to Mrs. Caroline King (complainant) for the sum of $3,500 cash (Rec. p. 165). Right here it will be observed that in this petition the lease of the premises in question is recited as a lease for a term "of five (5) years from the eighth (8) day of October, A. D. 1896," a period of seven years less than the true term.

Shortly after the original lessee's death a creditor's bill

was filed against his estate in the Supreme Court of the District of Columbia.

It does not appear from the record exactly when this original bill was filed by the Ohio National Bank, of Washington, D. C., by Messrs. Worthington, Heald & Frailey, as solicitors, and by the Second National Bank, of Washington, D. C., against Caroline King and her sons, upon which bill Judge Barnard, then a practicing attorney at our bar, and the said Harry King, were appointed receivers of the court of the assets of the original lessee. It does, however, appear that this was done within a year of the original lessee's death.

Upon the 24th day of June, 1901, a third amendment was filed to the original bill of complaint, and this amendment is set out in full at pages 215–218 of the record. This amendment attacks the sale from the administrator c. t. a. to the widow for actual fraud, and charges the said Harry King with perjury in connection therewith. It is further averred (Rec. p. 217) that the lease of the premises in question was at the time of said sale and also at the time of filing of said amendment worth at least $10,000. It further avers that in the month of November, 1898, Harry King was offered $10,000 for the lease of the premises in question, but that the said Harry King demanded $35,000 therefor.

On the 13th of August, 1901, Harry King filed his answer to the said amendment, which answer was also prepared by Mr. Tobriner (Rec. p. 242). Mr. Tobriner also prepared the assignment of the lease from Harry King, administrator c. t. a., to Caroline King (Rec. p. 242). In this answer Harry King states, under oath, as follows (Rec. p. 220):

> "That the lease mentioned in said petition and referred to in said amended bill was at that time bearing a very large and expensive rental; the various amounts due thereunder for rent were

overdue and unpaid, and the said lease was liable to forfeiture, and under the circumstances this respondent was of the opinion and still is of the opinion that the best thing which could have been done was to sell and dispose of the same at private sale in the manner that the said assets were disposed of; he further avers and says that it is untrue that the said lease could have been sold at a premium or bonus; that the same, because of the rental payable thereunder, were not salable, and of no value, and that no purchaser therefor could have been found."

Referring particularly to the leasehold interest in question (Rec. p. 221), he denies—

"that the leasehold interest for premises known as seven hundred and fifteen (715) Market space was on the twenty-fifth (25th) day of August, A. D. 1897, or now is, worth at least ten thousand dollars ($10,000), and could have been sold, or now can be sold, for that amount; he avers and says that with respect to said leasehold interests, that at the time he took upon himself the administration of his father's estate the neighborhood of said premises, seven hundred and fifteen (715) Market space, had greatly depreciated for business purposes, and that it is only within the last two years that it has again become useful and a fair stand for business purposes; that the rental for said premises is far beyond the rental produced by adjoining and neighboring properties of larger space and better improvements."

He further denies in the same answer that he received an offer of $10,000 for the said lease of the said premises, or that he demanded $35,000 therefor.

On page 207 he desires to make the following correction:

"The correction is that this check that I sent on August 11 to Mrs. Kennedy, after examining and

> finding out all the matter that I could get referring to this case, I did not know or did not remember at this time that the check had not been paid, but since then I have refreshed my memory, and I find that that check had not been paid. Therefore it left the rent of the Market space store unpaid."

At page 211 he says that the language of his answer with regard to the large and expensive rentals of the leases meant the leases on all the property. At page 212 he says:

> "I meant that the leases were liable to forfeiture; that the rent on 715 Market space had not been paid; there were two months' default in the rent of 814 Seventh street; there was one month's default in the rent of 812 Seventh street, which I have administration checks showing that the same was paid out."

This he subsequently contradicted.

Upon cross-examination in the case at bar, the witness King's attention was directed to the serious mistake in his petition for the sale of the lease in question, with respect to the unexpired term of the same. His attempt to explain this omission will be found at pages 209 and 210 of the record. He adds: "It is a typographical error, I suppose." Mr. Tobriner testifies (Rec. p. 252) as follows:

> "I must have had the lease, as well as I can remember, before me when I prepared the petition for the sale in the Orphans' Court, but there were so many endorsements on the lease, of extensions, that I must have made a mistake in calculating the time."

With respect to the averments in his answer to the third amendment in the Ohio National Bank case, the witness, Harry King, is still more unfortunate. At page 184 he is asked this question by his counsel:

> "It is claimed in one of the answers that in an equity suit of *The Ohio National Bank* v. *Caro-*

line King, No. 19,338 on the equity docket of this court, you stated that this lease was in default for rent and liable to be forfeited. Is that correct? A. That had no reference to 715 Market space. That had reference to the store on seventh street. The rent for them had been unpaid."

This he subsequently contradicted.

It appears by stipulation of counsel (Rec. p. 481) that subsequent to the testimony of the witness, Harry King, in equity cause 19,338, being that of the Ohio National Bank above referred to, the case was heard on the bill and answer, without the taking of testimony by either side, and that a decree was passed for the sale of the assets of Harry King, Jr., which decree does not attempt to include the lease of premises No. 715 Market space.

Harry King the Real Complainant.

Inasmuch as the natural grief of a widow is urged in the original bill (Rec. p. 3) as pertinent to her inattention to business matters, it is well to say that it appears from the testimony that her son, Harry King, was the business manager of the original lessee for some years prior to his death, as also of his mother, the complainant, after his death.

The testimony of Harry King is as follows (Rec. p. 184):

"Q. Mr. King, to what extent did you participate in the management of the business, during your father's lifetime? A. I was my father's general manager. Q. For some years prior to his death, you really managed and conducted the business; did you not? A. Yes, sir; I managed and conducted the business."

At page 193 he also gave the following testimony:

"Q. How long were you associated with your father, assisting him in business before his death? A. Since about 1888, I should say. Q. That is in the neighborhood of nine years? A. About that."

It further appears from the testimony of Harry King (Rec. p. 194) that his mother had no active share in the management of the business after she bought the lease. At page 194 of the record he testifies as follows:

> "Q. What relation did your mother have to the business? A. My mother occupied a position in charge of the salesroom, when she was there. Q. She had an active connection with the business? A. Not active at all times, but active at some times. My mother had not been a well woman. She has been quite sick, and she has been out of the store for some time. Q. Who, if anybody, chiefly had charge of the finances? A. I had charge of the finances."

Again, at page 187, he testifies as follows:

> "Q. You were manager of her business also, were you? A. Yes, sir. Q. In point of fact, you conducted her business for her, did you not? A. Yes, sir. Q. As you had done for your father during the last years of his life? A. Yes, sir. Q. Your mother did not take any active part in the financiering and management of it at all, did she? A. No, sir. Q. So that really you were the manager? A. Yes, sir."

It further appears that another brother, Joe King, was manager of the branch conducted at 715 Market space, the premises in question. At page 153 he testifies as follows:

> "Q. Where are you employed? A. 715 Market space. Q. Who is the manager of that business? A. I am the manager of the business 715 Market space."

Again, at page 155, he testifies as follows:

> "Q. When was it your father died? A. In 1897, sir; August 15. Q. And this was shortly before Christmas? A. Yes, sir. Q. And this was the first time you had seen her (Mrs. Kennedy), you

say? A. At that time; yes, sir. Q. What was your position in the store at that time? A. Manager. Q. Was your brother, Mr. Harry King, there? A. No, sir; I am the only person. Q. You are the manager of that branch? A. Of that branch, sir. Q. Was your mother there? A. No, sir; nobody but myself. Q. You yourself carried on the business there? A. Yes, sir."

The business relations existing between the widow and her sons are disclosed, as far as the record shows any disclosure, in the following testimony (Rec. p. 190):

Cross-examination of Harry King:

Q. Will you tell me, if you please, when the firm of Caroline King & Sons was formed? A. My mother gave us an interest in the business in the spring of 1898.

Q. Will you tell us who composed that firm? A. My brother Joe, my mother, my brother Abe for a short while, and myself.

Q. Were there any written articles of partnership? A. No, sir (Rec. p. 191).

Q. Who was authorized to draw checks relating to the business which your mother purchased in August, from August, 1897, up to the spring of 1898? A. I had a power of attorney.

Q. Did any one else have authority? A. I don't think so; I can not say.

Q. So that the only persons who were authorized to draw checks were you and your mother? A. I think that is the case. My brother also may have had a power of attorney. I don't remember that.

Q. After the spring of 1898, when this firm was formed, who had authority to draw checks? A. My brother and mother and myself.

Q. There were three sons, you, Joseph, and Abraham? A. Yes, sir.

Q. Abraham went out when? A. In a very short while.

Q. Was it a year? A. No, sir.

Q. A few months? A. Three or four months.

Q. And the business is still owned by your mother and your brother and yourself? A. Yes, sir; we have an interest in the business.

Q. Those three? A. Yes, sir.

Q. They are the only persons in the firm? A. Yes, sir.

Q. Each one of you three, since that firm was formed, had authority to sign checks? A. Yes, sir; I think that a short while ago we gave my brother Phil power to sign checks.

Q. He is not a member of the firm? A. No, sir. I can tell you why that was done if you would like to know.

Q. No; it does not interest me. When was the receivership on your father's estate created by the court? A. I think some time about a year afterwards or possibly three months longer. I can get the exact date.

Q. Has that receivership been terminated? A. No, sir.

Q. It still subsists? A. Yes, sir.

Q. So that prior to 1900 what you call the estate of your father was in the hands of receivers? A. Before that.

Q. I say that prior to 1900 and up to the present time the estate of your father has been in the hands of receivers? A. Yes, sir.

Q. And those receivers are yourself and Judge Barnard? A. Yes, sir. (Rec. p. 195.)

Q. I will have to trouble you to tell me what is the relative interest of yourself, your brother, and your mother in that business? A. We have a one-third interest in the profit of the business.

Q. Each of you? A. Yes, sir.

Q. Your interests are equal? A. Yes, sir. A one-third interest in the profits.

Q. Do you own, equally, the assets, and equally liable for the debts?

Mr. DARLINGTON: I object to calling on the witness for a legal opinion of what his liability is.

Q. What is your understanding of the agreement with respect to that? A. We have no agreement.

Q. You mean you have no written agreement? A. No, sir.

Q. Have you an interest in the business? A. I have a one-third interest in the profits of the business.

Q. And no interest in the losses? A. I don't know.

Q. Have you any interest in the assets? A. I could not answer that.

Q. You don't know? A. No, sir.

Q. You don't know whether or not you have an interest in any of the assets? A. No, sir.

Q. Does any of the merchandise in either of those stores belong to you? A. I really could not tell you.

Q. Have you any way of finding out? A. Not that I know of. It is a family affair, strictly,

Q. Still it is a firm? A. We call it so; yes, sir.

Q. Do you know whether your brother Joseph has any interest in the merchandise in those stores? A. He has the same interest in the business that I have.

Q. Do you know whether your mother has any? A. Yes, sir.

Q. But you don't know whether you own any part of it or not? A. No, sir.

Q. You don't know whether you are a partner or not? A. I have an interest in the business, and if you consider that a partnership, all right.

Q. Do you know in what month in the spring the firm was formed? A. That I could not say.

Q. Was it before or after May, 1898? A. It might have been after and it might have been before May. I could not tell you the exact date.

Q. It was in the spring? A. Yes, sir; in the spring.

Q. What did the assets then consist of? A. The general assets of the business.

Q. How was the rent for the property paid? A. The rent was paid out of the business.

Q. Out of the firm account? A. Yes, sir.

Q. To Mrs. Kennedy? A. Yes, sir.

Q. Up to 1901? A. Yes, sir; up to 1901.

It is thus apparent that neither the original lessee, H. King, Jr., nor his widow, Caroline King, are the persons with whom we are really concerned in this case. It is admitted that, for several years prior to the death of the original lessee, his son, Harry King, was the real manager of the business.

Failure to Pay Tax Either Intentional or Due to Great Inattention to Covenant Duty.

This being the situation, the next pertinent occurrence was that a few days before Christmas, in 1897, according to the testimony of the said Joseph King (Rec. pp. 154, 155), the lessor came to the premises in question and said to him—

> "that she had neglected to notify us in reference to the taxes, and if we wouldn't have them paid, and I said I would go up and tell my brother and notify him at once; that she needn't worry, it would be attended to."

It is not disputed that this tax was paid by Harry King.

It is equally undisputed that from that time (December, 1897,) until July, 1900, no one paid any taxes on the premises in question. But it is well settled law that the assignees of the original lessee are bound by the covenants of the lease.

It has been explicitly decided that where the original lease names the assigns of the lessee in a covenant to pay taxes, such assigns are bound (*Wickes* v. *Rudson*, 1899, 1 Q. B. 474). Many other authorities might be cited to sustain this proposition, but it is, we suppose, undisputed. This being the case, when the plaintiff bought from the administrator c. t. a. of the original lessee the lease in question, it was her duty to ascertain exactly what the obligations thus assumed by her were.

In this connection it becomes important to recur to the admitted fact that the covenant embraced two small parcels in the rear of lot "A" which parcels were just as much a part of the demised premises as was lot "A" itself. During the life of the original lessee, Mrs. Kennedy (the lessor) by mistake paid these taxes and was never reimbursed by the tenant. She ceased, however, paying them in 1897, and no act of hers can be said to have estopped her from claiming that the assignee should perform her covenant in full. It is undisputed that the assignee has never paid any taxes whatever on these rear portions and that repeated defaults have been made by her in that regard.

When we recur to main lot "A" we find that in December, 1897, Mrs. Kennedy, whatever she had done in the case of the original lessee, pointedly altered that practice when dealing with the assignee; instead of paying the taxes herself, she called the attention of the assignee to them and requested said assignee to pay them. Thereafter she took absolutely no action with respect to them.

Suspicious Testimony of Witness Rodgers.

Thereafter nothing pertinent occurred until July 24, 1900, when Harry King, according to his testimony, without any notice or suggestion from any one, happened to think of his obligation to pay these taxes, and sent his bookkeeper Rodgers to the tax office to pay all taxes on these premises (Rec. pp. 126, 171).

This is especially important as indicating that he fully understood that the duty of paying these taxes rested primarily upon hi : , and not upon the lessor. He says so unequivocally in his cross-examination (Rec. p. 187). Rodgers reported to him that certain taxes were due. Thereupon those said to be due were paid (Rec. p. 126).

Again, on the 21st of May, 1901, Rodgers was sent over

to the tax office by Harry King and had an interview with the tax clerk, which is given in full at pages 127, 128, of the record. As a result of this, he left the tax office with the assurance that all back taxes had been paid, and so informed Harry King.

As the testimony of this witness Rodgers is especially significant, the court is earnestly asked to read it carefully.

The testimony of this witness begins at page 126 of the record and continues to page 139. At page 140 he was recalled and his testimony continues to page 152. The significance of his testimony depends upon his statement that on the 24th day of July, 1900, he went to the tax office in this city and asked for the tax bills upon the premises in controversy, and received a bill for that year, and was told by the official on duty that the bill contained all the taxes which were then due upon that property: that he took the bill to the store and that Mr. King signed a check for it in the name of the firm and that he took it over and paid it and got a receipt (Rec. p. 136); that on the 21st day of May, 1901, he again went to the same office for the taxes of 1901, and the bill was handed to him. On the 24th day of May, 1901, Mr. Harry King signed a check for that bill, the witness took it over, and as three days had passed between the time he got the bill and the date of the check he asked again whether everything was all right, to which, after some conversation, the clerk answered that there were some back taxes on it; whereupon, after some more conversation with the clerk, he took all the bills that the clerk gave him back to Mr. King, had a new check made out, paid them, and got the receipted bills therefor.

If the testimony of this witness were true it tended to strengthen the case of the plaintiff. The case of *Noyes* v.

Anderson, 124 N. Y. 175, cited in the original brief of the defendant Webb, was used during the hearing of the interlocutory appeal. The court's recital of the facts of that case in its opinion was as follows:

> "It appears that he might have ascertained about it (the defaulted tax) at the office of the clerk of arrears, but when he paid the tax of 1886 at the tax office in the city the son was, upon his inquiry, informed by some one in the office that there was no sum due for any arrears against the property. It is clear that the purpose of the defendant's son was to pay the taxes and assessments, and that his failure to make an earlier payment in this instance was not wilful neglect on his part, nor was the plaintiff prejudiced by it."

Had Harry King been present in court during the hearing of this appeal, which so strongly interested him, or had he read this brief of counsel in his own case, he would have become aware of the significance of such proof. If he has attempted to prove a matter of this kind by a suspicious witness, the attempt must recoil upon him.

The story of the witness Rodgers (Rec. p. 126) is as follows: That on the 24th of July, 1900, he went over to the tax office and asked for the tax bills on the King's Palace branch (the premises in controversy). He went to the collector of taxes for a bill of the taxes that were due; it being his first bill that he had paid on taxes, he was anxious to know that he got a bill for everything that was due; he asked them if that was everything that was due and they told him yes. He took the bill to the store, and Harry King signed a check for it in the name of the firm, and the witness took it over and paid it and got a receipt. This check and receipted tax bill will be found in the record at pages 279 and 280, and have been already referred to. At page 127 the witness says that he went to the same office on the 21st day of May, 1901,

to get the bill for the taxes of 1901. He gave the following account as to what then occurred:

> "I went there on the 21st of May, 1901, to get the bill for the taxes of 1901, and the bill was handed to me. On the 24th of May, Mr. Harry King signed a check for that bill, and I took it over, and as three days had passed between the time I got the bill and the check he made out, I went and asked them, and said: 'Now look here; am I sure this is all right?' They said: 'Yes, sir; this is all right.' I said: 'This clears the taxes on this property.' 'Well,' he says, 'there seems to be some back taxes on it.' I said: 'That is very funny. I paid the taxes here a year ago, and they said the taxes were all paid, and I know there has nothing accrued since.' He says: 'We can't tell you what it is. You will have to go downstairs to find out.' I went downstairs and showed them this check and this bill. I said: 'It is very funny. I have been trying to keep these taxes up. You told me here a year ago there was nothing due on this property, and upstairs here, after I brought this check for 1901, they tell me there is something back of it. What is it?' I said: 'Give me a bill for whatever is due on the property, and I will get another check.' I didn't pay him that check on the first bill. I held it still. He handed me over then another bill, which covered the last half of 1898 on a little sublot there, and the whole of 1899 on that same sublot, and the whole of 1899 on lot A, amounting to nearly double the 1901 taxes. 'Well,' I said, 'this is very funny. Mr. King wants to keep these taxes paid up, and here you told me here a year ago, and again the other day, that there was nothing due; and here I find out a whole year has not been paid.' 'Well,' he says, 'I don't know how that occurred.' I went back to the office and showed this bill to Mr. King, and I said, 'You had better give me another check,' so he gave me another check, and I took the two checks over together and got the receipts for those bills."

It is most significant that these pregnant facts, said to have occurred in July, 1900, and May, 1901 (the bill was filed on December 4, 1901), and so recently as to be fresh in the memory of Harry King, were not mentioned in any form in the pleadings.

On page 283, "Exhibit Rodgers, No. 6," is a bill paid by Rodgers in May, 1901, which shows that the property had been sold on April 12, 1900, to C. M. Wiltsie, the same man who had bought the same premises in April, 1899, for the unpaid instalment of taxes for the latter half of the year 1898. So that the statement of the witness Rodgers on the second point, too, is on its face improbable in the highest degree. When his cross-examination is taken up, at page 130 of the record, beginning with the question towards the bottom of the page: "Q. Did you take the number of the lot and square with you?" down to the close of his first cross-examination by Mr. Johnston, at page 139, and when his statements in this cross-examination are compared with his testimony upon redirect examination by Mr. Tobriner, beginning at page 140 and ending at page 142, and when these are again compared with his second cross-examination by Mr. Perry, beginning at page 142 and extending to page 146, and by Mr. Johnston, beginning at page 147 and extending to page 152, it will be found that his contradictions are such as to utterly discredit him. Nor is this all. Certain statements of his admitted of positive contradiction.

The testimony of Miss Lidie Addison (Rec. p. 452) convicts him of untrue statements in several respects. Miss Addison testifies that at the time in question she was employed in the assessor's office of the District of Columbia. She identified the tax bill (Exhibit Rodgers, No. 2) found at page 279 of the record, being the bill paid by Rodgers on the 24th day of July, 1900, as being in her handwriting, her initials "L. A." being in one corner of

the paper, written there by herself. She further testified, in contradiction of Rodgers, not only that she had not made out this bill in advance and deposited it in a box on a table to be delivered when called for, but that she could not have done so under the course of business then obtaining in the office.

The then course of business of the office was such that she necessarily gave it to the person who asked for it. She thereby flatly contradicted the witness Rodgers in his testimony at page 150. She further testified that she had no personal or official knowledge with respect to the existence of arrears of taxes on this piece of property (Rec. p. 453); that she had a general knowledge that a good many pieces of property were in arrears, but no personal knowledge of their existence on that property. She further testified explicitly that she did not at the time of making out and delivering the bill in question state to Mr. Rodgers or anybody else that there were no arrears upon that property, or anything to that effect. She reiterated that she had no knowledge of arrears on that special piece of property which would have enabled her to give any information on the subject of arrears to anybody. She further testified that she had never been in the arrears division. Here, therefore, in addition to the overwhelming probability of the matter, is positive testimony to the effect that the witness, Rodgers, could not have gotten in July, 1900, any information whatever from the person from whom he got this bill as to whether there were arrears on the property or not. When he did ask for arrears in May, 1901, he got the information which is detailed at pages 278–285 of the record, and as has been said, it is incredible that when he got this information he did not also get the information of the tax sale made in April, 1899.

It must be borne in mind that the testimony of Miss Addison upon these points is conclusive. If she was

mistaken many witnesses in the tax office could have testified as to the course of business there. Not one of these was called to correct her statements.

Of course, Rodgers has not made these statements in his own interest, but in the interest and at the instance of Harry King.

The next thing that occurred was Wiltsie's letter of July 24, 1901 (Rec. p. 285), offering to sell to the complainant the tax title of April, 1899, irredeemable since April, 1901.

Then ensued the correspondence between Wiltsie and Harry King, which has already been printed in full in this brief (*supra*, pp. 77-83).

Let us pause at the day towards the last of September, when Knight informed Kann and Webb of the existence of this irredeemable tax sale.

It is conceded by the pleadings that none of the defendants had, down to that time, anything to do with the lessee's breach of covenant and its consequences. Whatever claim she makes beyond that rests upon the charge of fraud.

Accident, inadvertence, mistake, are what she relies upon up to this point.

What case has she made out from her testimony resting upon any one or more of these grounds?

What Sort of Accident or Mistake is it that a Court of Equity Relieves Against?

We are told in the first volume of Story's Equity Jurisprudence, section 78, as follows:

> "And first of accident. By the term 'accident' is here intended not merely inevitable casualty or the act of Providence, or what is technically *vis major* or an irresistible force; *but such unforeseen events, misfortunes, losses, acts or omissions, as are not the result of any negligence or misconduct of the party.*"

If we turn to the head of "*Mistake*," we find in the same authoritative work, section 146, the following statement:

> "It is not, however, sufficient in all cases to give the party relief that the fact is material, but it must be such as he could not by reasonable diligence get knowledge of when he was put upon inquiry. For *if, by such reasonable diligence, he could have obtained knowledge of the fact, equity will not relieve him, since that would be to encourage culpable negligence.*"

In the last (third) edition of Pomeroy on Equity Jurisprudence, the definition of "accident," in its legal acceptation, is as follows (sec. 823):

> "Accident is an unforeseen and unexpected event, occurring external to the party affected by it, *and of which his own agency is not the proximate cause*, whereby, contrary to his own intention and wish, he loses some legal right or becomes subjected to some legal liability, and another person acquires a corresponding legal right, which it would be a violation of good conscience for the latter person, under the circumstances, to retain. If the party's own agency is the proximate cause of the event, it is a mistake rather than an accident."

In section 828 the author says:

> "The jurisdiction will not be exercised on behalf of a party when the accident is the result of his own culpable negligence or fault."

Again, at section 452, the author says:

> "In a case where an agreement creates a mere pecuniary obligation, so that a forfeiture incurred by its breach would ordinarily be set aside, a court of equity will refuse to aid a defaulting party, and relieve against a forfeiture, if his violation of the contract was the result of gross negligence, or was wilful and persistent."

In support of the text the author refers to the case of *Parsons* v. *Smillie*, 97 Cal. 647, holding that "'wilful' forfeiture simply means one voluntarily incurred." In this note the author criticises the case of *South Penn Oil Co.* v. *Edgell*, 48 W. Va. 348, hereinbefore commented upon, and says:

> "The case" (referring to the case under discussion) "seems hardly in accord with the general rule as laid down in the text."

On the subject of "mistake," the same author says (section 856):

> "As a second requisite, it has sometimes been said in very general terms that a mistake resulting from the complaining party's own negligence will never be relieved. This proposition is not sustained by the authorities. It would be more accurate to say that where the mistake is wholly caused by the want of that care and diligence in the transaction which should be used by every person of reasonable prudence, and the absence of which would be a violation of legal duty, a court of equity will not interpose its relief; but even with this more guarded mode of statement, each instance of negligence must depend, to a great extent, upon its own circumstances. It is not every negligence that will stay the hand of the court. The conclusion from the best authorities seems to be, that the neglect must amount to the violation of a positive legal duty."

The leading English case upon this subject is that of the *Duke of Beaufort* v. *Neeld et al.*, 12 Cl. & F. 248. The circumstances of this case were these: A certain act of Parliament authorized exchanges of land, upon conditions therein prescribed, among which conditions was the written consent of the owners of the lands intended to be exchanged. The landowners of a parish determined to

carry this act into execution, and appointed a commissioner for that purpose. The Duke of Beaufort, one of the landowners, authorized his agent to attend for him at the meetings held for the purpose of carrying the act into execution, but desired him not to exchange a particular wood except for woodland. Neeld's lands were to be exchanged against those of the Duke, and this restriction was communicated to Neeld's agent, who, being asked to exchange another wood against the wood in question, said that his principal had no power to do so. This answer was communicated to the Duke, who took no further notice of the matter. The restriction on the authority of the Duke's agent did not appear to have been brought to the knowledge of the commissioner. The commissioner prepared and the Duke signed a written consent to ratify the exchange of certain closes belonging to him, and designated in the consent by numbers. Among the closes thus designated was the wood in question; but the number by which it was referred to in the consent and in a map and plan previously submitted to the Duke's inspection was not the same as that which it bore in the Duke's private map of his own estate. A comparison of the two maps, or the reading of the plan sent with the commissioner's map, would have shown the Duke that the wood in question was included in his consent. The commissioner allotted the lands to be exchanged, and among them included this wood, but did not give woodland for it. Possession of the exchanged lands and of this wood (although the award of the commissioner had not been formally executed) was delivered by the Duke's agent to Neeld, who immediately began to exercise acts of ownership over it. The Duke some time afterwards discovered what had been done, and brought ejectment against Neeld for the wood. Neeld filed his bill in chancery to restrain the Duke from proceeding with the action, and to compel him to perfect the

exchange; and the Duke filed his bill to prevent the commissioner from executing the award, alleging that the consent given to him had been signed in mistake.

During the argument, counsel for the Duke said:

> "The appellant was deceived here. He did not know that this property was comprised in the proposed exchange. It may be true that the agent knew it, but then he had a restricted authority which bound him not to exchange Dunley Gorse, except on the terms of wood for wood. The appellant signed the supposed contract in mistake, and it is a principle of equity that a mistake will vitiate a contract, and that, under such circumstances, the suffering party shall be relieved."

Lord Brougham interrupted and said:

"But equity has not relieved against gross improvidence."

The Lord Chancellor (Lyndhurst), in delivering the opinion, said:

> "But I think it was the Duke's business to have made inquiry. He ought to have inquired of Mr. Watkins, his solicitor, if he wished to ascertain the fact. He ought to have made inquiry as to what those numbers meant, and what the lands were which were intended to be given in exchange; or, if Mr. Watkins was not in a condition to inform him, which probably he was not, he might have made inquiry of Mr. Wedge, his agent in the country. A delay of a day or two might have been occasioned by making these inquiries, but if he did not choose to make them—if he did not choose to exercise due caution in that respect—he can not turn around and say, 'I really did not know the contents of the paper when I signed it. I signed it incautiously.' He can not now with propriety say that, so as to free himself from the effects and consequences of his own act.
>
> . . . . . .

(P. 274):

> "Then when we come to the ratification, what is the effect of the ratification? If the Duke does not choose to make inquiry—if he does not choose to exercise ordinary caution, but puts his signature to the instrument, giving authority to the commissioner to proceed in his name and act upon his interests; and if the commissioner acts upon that authority, and other parties deal with the commissioner, and the exchanges go on and are completed—it appears to me rather a strong proposition to say, that the Duke is not bound by the act of the commissioner, that act being founded upon his written consent, under the circumstances which I have stated. . . . If the Duke himself has incautiously signed the instrument to which I have referred, is the party dealing with the Duke to suffer, or the Duke, who has himself compromised his own interest by his incautious proceedings? Undoubtedly the Duke."

Lord Brougham said (p. 282):

> "Now, either the contents of that paper may have been hastily and inaccurately considered by him" (the Duke), "or he may not have looked at them and considered them at all, or in looking at them, he may have found, as is alleged, and as my noble and learned friend has already adverted to, that neither Dunley Gorse nor any other close was named, but that all the closes were referred to by numbers, which numbers referred to a plan. That is all very true, but, still, before a person signs his name to an instrument, he is bound to look. He need not look if he does not choose, but then if he does not look, he must bear the penalty of being held to have looked; and if he either shuts his eyes, or carelessly sees, he shall not be allowed in a court of law or equity to say, 'It is a mistake—I never knew it,' because he might have known it, and he ought to have known

it; and if he signs his name, and could have looked, and did not look still he is bound by his act."

Lord Campbell said (p. 285):

"But then we come to the consent, which was signed by the Duke's own hand; and at that time again I believe what the Duke says, that he was ignorant of what he was doing. Because he is a man of unblemished honor, I have no doubt that everything he says is strictly and correctly true. But he has the means of knowing; he wilfully shuts his eyes (I do not say that offensively at all), with the means of knowledge within his power; and it being his duty to have ascertained the fact, can he be heard to say, 'I was ignorant; relieve me from the effects of the mistake which I have made'?

"The learned counsel for the appellant cited a great many cases, which are perfectly well decided, to show that, where the interposition of a Court of Equity is asked against a man who has fallen into a mistake, it will not interpose. There may be certain cases in which equity will not consider him bound by that which he has done under a mistake. But, notwithstanding Mr. Turner's great learning, industry, and research, he could point out no case in which a Court of Equity had been successfully asked to interpose in favor of a man who wilfully was ignorant of that which he ought to have known—a man who, without exercising that diligence which the law would expect of a reasonable and careful person, committed a mistake, in consequence of which alone the proceedings in court have arisen. No such case is to be found; *and it would be a reproach to the law if there could have been such a decision.*"

In the case of *Barrows* v. *Isaacs*, decided by the Court of Appeals, 1 Q. B. D. (1891), 417, the lessee covenanted not to underlet without consent of the lessor, which

consent the lessor agreed should not be arbitrarily withheld in case of a sublease proposed to a responsible party. The lease provided for power to reenter for breach. The lessee underlet part of the premises to a responsible party, but, on account of the neglect of his solicitor to look at the original lease, the consent of the lessor was not obtained. The court held that the omission was not a mistake for which a court of equity would grant equitable relief against forfeiture; nor was there fraud or accident within the meaning of those terms as construed by a court of equity in granting relief. Beginning at page 425, Kay, L. J., discusses the subject at length, and in view of the importance of his decision, we quote so much of it as concerns the point under discussion:

> "It has been argued (1) that this was a mistake which enables equity to relieve against the forfeiture; (2) that it would be a proper exercise of that discretionary jurisdiction to do so in this case, as no damage has been done to the plaintiff by the underlease. I do not desire to cast the least doubt upon the jurisdiction of the court to relieve in cases of what it calls mistake; what we have to determine is whether such relief would be a proper exercise of that jurisdiction in this case. Long ago courts of equity assumed jurisdiction to relieve against forfeitures and penalties where the only object was to secure payment of a definite sum of money, even though there was no fraud, accident, surprise, or mistake. On this principle it relieved against the payment of the whole penalty on a money bond before the statutes 4 & 5 Anne, c. 16, ss. 12 and 13, and 8 & 9 Wm. 3, c. 11, which enabled courts of law to give the same relief. Also against forfeiture for non-payment of rent, and by statute 4 Geo. 2, c. 28, its powers in this respect were somewhat restricted by limiting the time for their exercise to six months after execution in ejectment. At first there seems to have

been some hesitation as to whether this relief might not be extended to other cases of forfeiture for breach of covenants, such as to repair, to insure, and the like, where compensation could be made; but it was soon recognized that there would be great difficulty in estimating the proper amount of compensation; and, since the decision of Lord Eldon in *Hill* v. *Barclay*, it has always been held that equity would not relieve, merely on the ground that it could give compensation, upon breach of any covenant in a lease except the covenant for payment of rent. But of course this left unaffected the undoubted jurisdiction to relieve in case of breach occasioned by fraud, accident, surprise, or mistake. At present the only one of these we have to deal with is mistake; and the questions are, (1) whether the facts I have described amount to mistake; and, if so, (2) whether in its discretion the court will relieve. Very wisely, as I presume to think, the courts have abstained from giving any general definition of what amounts to mistake. It is an easily arguable question whether mere forgetfulness of such a covenant—even if not negligent—can properly be called mistake. The case of *Kelly* v. *Solari*, however, and the observation of Lord Blackburn in the House of Lords in *Brownlie* v. *Campbell*, establish that, in an action to recover money paid by mistake, it is sufficient to prove that at the time of the payment the person paying was actually ignorant that the money was not due, although he had the means of knowledge, and it was owing to his own carelessness or forgetfulness that he was in fact ignorant. There undoubtedly forgetfulness of the previous payment is treated as mistake. But in those cases the payee is in possession of money which he had no right to receive, and which really belongs to the person who paid it, and no amount of carelessness on his part can justify the payee in retaining it. I feel great difficulty in saying that if this be mistake at law it would not be considered mistake in equity. It is an entirely different question

whether on the ground of such a mistake equity, in the exercise of its discretionary jurisdiction, would relieve a man from a forfeiture incurred by his own gross carelessness. *Vigilantibus, non dormientibus, leges subveniunt.* Equity is bound to consider all the circumstances of each case. To a suitor asking to be relieved from forfeiture, the result of carelessness so gross that it might almost be called wilful, it can hardly be favorably disposed. I have spoken of the right of reentry of a landlord as a 'forfeiture' of the lease, but the use of the word 'forfeiture,' in cases of this kind is somewhat misleading. This is not like a condition in a will, non-compliance with which causes a forfeiture. It is a contract between landlord and tenant that if the latter does, or omits to do, certain specific acts, then the landlord may reenter. Lord Eldon, in *Hill* v. *Barclay*, dealing with Lord Erskine's observations as to relieving against breach of covenant to repair, said: 'A particular case might perhaps occur, such as are put by Lord Erskine in *Sanders* v. *Pope*, in which it would be demonstrable that the landlord would sustain no injury by the relief; but it is taking a prodigious liberty with a contract by which a tenant has undertaken forthwith to repair.' I understand that to mean that it is a very strong proceeding for equity to interfere with the contract of the parties that the landlord may reenter for breach of covenant, in that it can only do so in very exceptional circumstances. In *Earl Beauchamp* v. *Winn*, the Court of Chancery has refused to rescind an agreement which it was sought to set aside on the ground of mistake common to both parties. The mistake alleged on the part of the Earl was that he thought he had merely a right over the surface of a certain common, called East Common, instead of being owner of the soil as he really was. This depended upon the doubtful construction of an ancient grant in 1799, which was among his title deeds, but which the Lord Chancellor was of opinion he was not guilty of any negligence in not having consulted. The Lord

Chancellor said (p. 230): 'This is not a case of mistake, therefore, but of ignorance, and ignorance resulting from a party's own omission to avail himself of information within his power.' At page 233 he says: 'The cases in which equity interferes to set aside contracts are those in which either there has been mutual mistake or ignorance in both parties affecting the essence of the contract, or a fact is known to one party and unknown to the other, and there is some fraud or surprise upon the ignorant party.' At page 235 the Lord Chancellor adds that if the Earl had mistaken his right to the East Common, and that he was in law the owner of the soil, instead of having merely a right over the surface, there was jurisdiction in equity to set aside the agreement. The House came to the conclusion that there was not any mistake, and affirmed the decision. The Lord Chancellor's former words, as to the ignorance not being mistake, are probably a statement of the argument which had been addressed to the House rather than his own opinion. However, he carefully excepts the case of ignorance arising from negligence of the person who seeks relief. In the well-known case of *Duke of Beaufort* v. *Neeld* an exchange was made of lands under the Inclosure Act, 6 & 7 Wm. 4, c. 115, s. 35, of which act requires the consent in writing of the proprietor. The Duke of Beaufort signed a written consent. The commissioner directed the exchange, and Neeld entered upon the lands exchanged. The Duke sent a written notice to the commissioner, declaring that his consent had been signed under a misapprehension. The Duke then brought an action of trespass and ejectment, in which judgment was given against him. He then filed a bill to rescind the written consent. During the argument Lord Brougham said, 'equity has not relieved against gross improvidence.' Lord Lyndhurst, L. C., in giving judgment, said that the Duke stated that, when he signed the consent, he did not know that the piece of land in question was included in it, because it was mentioned, not by name, but by a

number which referred to a map not then in his possession. But he says it was his duty to make inquiry, and, 'if he did not choose to exercise due caution in that respect, he can not turn round and say, "I really did not know the contents of the paper when I signed it; I signed it incautiously." He can not now with propriety say that so as to free himself from the consequences of his own act.' Lord Brougham said: 'He need not look if he does not choose; but then, if he does not look, he must bear the penalty of being held to have looked, and if he either shuts his eyes or carelessly sees, he shall not be allowed in a court of law or equity to say, "It is a mistake; I never knew it," because he might have known it, and he ought to have known it, and if he signs his name, and could have looked, and did not look, still he is bound by his act.' Lord Campbell, in the same case, said: 'But then we come to the consent which was signed by the Duke's own hand, and at that time I believe what the Duke says, that he was ignorant of what he was doing. Because he is a man of unblemished honor, I have no doubt that everything he says is strictly and correctly true. But he has the means of knowing; and he wilfully shuts his eyes (I do not say that offensively at all), with the means of knowledge within his power, and it being his duty to have ascertained the fact, can he be heard to say, "I was ignorant; relieve me from the effects of the mistake which I have made"?' The equitable relief sought in that case was refused partly on this ground. It is a decision of the highest tribunal that equity will not relieve when the mistake arises from the negligence of the suitor who seeks its help.

"I am clearly of opinion that Messrs. Isaacs must be held responsible for any negligence of Mr. Sydney. Their plea for relief therefrom, explicitly stated, would run thus: 'We admit that we were aware of the necessity of obtaining the plaintiff's consent before making the underlease. The lease to us which imposed that obligation was in our possession. We had forgotten the provisions

of it. The ordinary course of business required that we should examine the lease before granting the underlease. We admit that we neglected to do so, but we say that no harm has been done to the plaintiff, and, therefore, equity should relieve against the forfeiture.' There must have been thousands of cases in which leases have been forfeited owing to non-performance of covenants through bona fide forgetfulness. Counsel have not cited to us, nor have I been able to find, a single instance in which relief has been given under such circumstances. *It is impossible not to see that such relief would be an incentive to negligence. If we were to grant it, hereafter lessees might avoid looking at their leases, lest they should be reminded by them of obligations which it would be more convenient to ignore.* Many suits would be instituted for relief upon this ground, which, until now, is unknown in the records of the court as one upon which relief would be granted. The course of legislation upon this subject of forfeiture of leases by breach of contract is most significant. At first, as I have pointed out, the remedial jurisdiction of equity against penalties was extended to courts of common law. Next, the relief it gave in cases of forfeiture for non-payment of rent was limited in time. Then ensued a long period in which equity seems to have refused relief in cases of breach of any of the other covenants in a lease. Very hard cases occurred, in which unconscionable landlords insisted on their legal rights. Especially hard were these forfeitures for breach of the covenant to insure when no damage had ensued. By 22 and 23 Viet. c. 35, ss. 4–9—extended to courts of common law by 23 and 24 Viet. c. 126—it was enacted that 'a Court of Equity shall have power to relieve against a forfeiture for breach of a covenant or condition to insure against loss or damage by fire where no loss or damage by fire has happened, and the breach has, in the opinion of the court, been committed through accident or mistake, or otherwise without fraud or gross negligence, and there is an insur-

ance on foot at the time of the application to the court, in conformity with the covenant to insure, upon such terms as to the court may seem fit.' The terms of that enactment, making it lawful to give this relief when the breach has been committed 'through accident or mistake, or otherwise without fraud or gross negligence' show plainly that equity had not been accustomed to relieve in such cases on the ground of accident or mistake, and, further, they provide that relief shall not be given, even in cases of accident or mistake, when there has been gross negligence. Now, by the conveyancing act, 1881, these enactments are repealed; but a *locus penitentiae* is given to the lessee by requiring, in case of any breach of covenant, that the lessor shall serve upon him a notice specifying the breach and requiring him to remedy it, and to make compensation in money, before exercising his right of reentry; otherwise the high court may grant relief upon proper terms. But it is expressly provided that this does not extend to a covenant against assigning, underletting, parting with the possession or disposing of the land leased. Forfeiture for breach of this covenant is left to be dealt with according to the ordinary law and practice of courts of equity.

"Upon the whole, therefore, assuming, what I do not think it necessary to affirm or deny, that the high court had jurisdiction to relieve in this case, if in its discretion it thought fit to do so, for the reasons I have given I am of opinion that to grant such relief would not be a proper exercise of that discretion, and, accordingly, I think that this appeal should be dismissed with costs."

The case of *Eastern Telegraph Co.* v. *Dent*, 1 Q. B. D. (1899) 835, which was a case in the Court of Appeal, was this: In a lease for years, the lessees covenanted not to underlet, assign, or part with the possession of the premises, or any part thereof, without the consent in writing of the lessors, such consent not to be unreasonably withheld. The lease contained a power to reenter

upon breach of any of the covenants. The lessees, without asking the consent of the lessors, underlet a part of the premises to a tenant who already occupied under the lessors, and to whom no objection could have been reasonably taken. In an action by the lessors to recover possession of the premises for breach of covenant, it was held that the fact that the breach of covenant had been committed through forgetfulness, or because the lessees thought it unimportant, did not form a ground for giving them equitable relief against forfeiture for breach of the covenant, and that the plaintiffs were entitled to succeed in the action. The case of *Barrows* v. *Isaacs* (*supra*) was followed, and the case of *Hyde* v. *Warden* (1877, 3d Ex. D., 72) was questioned.

In delivering the unanimous opinion of the court, Smith, L. J., said, referring to the case of *Hyde* v. *Warden:*

> "If this judgment is in conflict with the subsequent case of *Barrow* v. *Isaacs*, I certainly agree with the decision in the last-named case. It covers the case now before us; and, apart from it, *I could not bring myself to say that a judge could run his pen through that part of the contract, which is that consent should be asked for, and render it of no effect.*"

Collins, L. J., said (p. 838):

> "*Hard cases must not be allowed to make bad law.* . . . If there is a conflict of authority, and I am to decide this case on first principles, it seems to me to be clear that there was a breach, and I can see nothing which the defendants can set up in a court of law or equity in answer."

Romer, L. J., said (p. 839):

> "I think it is quite clear that there was a breach. The proviso to the covenant has no application to this case, for it can not be said that the lessors unreasonably withheld their consent

> to a subletting, because no consent was asked for. Under these circumstances the lessors have a legal right under the contract which they can enforce by coming to the court. Then it is said there is some right to equitable relief on the ground that the lessees made a mistake in not asking the consent of their lessors. There are some cases in which equity will interfere on the ground of mistake—generally cases of mutual mistake, but occasionally cases of unilateral mistake. The suggestion that it is a ground for relief in equity, against the enforcement by the landlord of his legal right, that the tenant has committed the breach of covenant either through thoughtlessness or because he thought the breach unimportant, has no foundation in principle or authority."

Upon the argument below counsel endeavored with great skill to distinguish these cases from that at bar. The argument of counsel in this respect, however skilful, is a mere attempt to cloud by words that which is perfectly clear. The contracting parties in the case at bar, as in the two cases last cited, had entered into obligations and acquired rights in good faith. In those cases, as in the case at bar, a breach of covenant was made, and the guilty party applied for relief against the consequent forfeiture. It was not suggested by counsel who argued for the forfeiture that harm had resulted in point of fact from the breaches in those cases. It was strongly urged that it was inequitable to enforce a forfeiture under such circumstances. The judges, however, unanimously held that they could not, without violating contract rights, which they had no jurisdiction to do, run their pen through a covenant made by the parties and a condition of breach affixed thereto because a sentimental reason was urged for such proceeding. They could not forfeit a man's right to his contract at the instance of a man who had, by contract, himself forfeited his right.

It is true that these cases do not deny the jurisdiction of a court of equity to relieve in a proper case of mistake; nor do they attempt to make such denial. To so construe them is contradictory of their plain language. But they do unequivocally decide that negligence or forgetfulness is not mistake. Nor does it aid counsel for the appellee to introduce the subject of unilateral mistake. The case at bar is of that description. It is not pretended that the lessor was under any mistake in the premises. The closer the cases quoted are studied, the more they will be seen to be on all fours with the case at bar in so far as the principle involved is concerned.

Coming now to the American decisions, we refer first to the leading case of *Grimes* v. *Sanders et al.*, 93 U. S., p. 55, decided by this court in the year 1876. Mr. Justice Swayne delivered the unanimous opinion of the court. This was a case of a bill in equity filed for relief from the consequences of what was said to be a mistake. The appellant, Grimes, owned two tracts of land, the larger of which was regarded as valuable on account of the gold supposed to be upon it. The two tracts were separated by intervening gold-bearing lands which the appellant had sold to others. Authority was given by Grimes to an agent to sell the two tracts in question. The agent acted upon this authority, and a conveyance to the purchaser was prepared. Opportunity was given to the purchaser for an examination of the tracts, which examination was made, and the ground was paid for. This was in the month of March, 1866. In September of the same year the purchaser alleged that there had been a mistake as to the land actually bought, and that he supposed he was buying other land. On the 21st of March, 1868, the purchaser filed a bill for relief on the ground of mistake. The court below sustained the bill, whereupon Grimes, the owner, appealed to the Supreme Court of

the United States. Mr. Justice Swayne delivered the unanimous opinion of the court, and said (p. 61):

> "Mistake, to be available in equity, must not have arisen from negligence, where the means of knowledge were easily accessible. The party complaining must have exercised at least the degree of diligence 'which may be fairly expected from a reasonable person.' Kerr on Fraud and Mistake, 407.
>
> "Fisher, the agent of the appellees, who had the deed prepared, was within a few hours' travel of the land when the deed was executed. He knew the grantor had sold contiguous lands upon which veins of gold had been found, and that the course and direction of those veins were important to the premises in question. He could easily have taken measures to see and verify the boundary lines on the ground. He did nothing of the kind. The appellees paid their money without even inquiring of any one professing to know where the lines were. The courses and distances specified in the deed show that a surveyor had been employed. Why was he not called upon? The appellants sat quietly in the dark, until the mistake was developed by the light of subsequent events. Full knowledge was within their reach all the time, from the beginning of the negotiation until the transaction was closed. It was their own fault that they did not avail themselves of it. In *Manser* v. *Davis*, 6 Ves. 678, the complainant, being desirous to become a freeholder in Essex, bought a house which he supposed to be in that county. It proved to be in Kent. He was compelled in equity to complete the purchase. The mistake there, as here, was the result of the want of proper diligence. See, also, *Seton* v. *Slade*, 7 Ves. 269; *2 Kent's Com.* 485; *1 Story's Eq.*, sects. 146, 147; *Atwood* v. *Small*, 6 Cl. & Fin. 338; *Jennings* v. *Broughton*, 17 Beav. 141; *Campbell* v. *Ingilby*, 1 De G. & J. 405; *Garrett* v. *Burleson*, 25 Tex. 44; *Warner* v. *Daniels* et al., 1 Woodb. & M. 91;

Ferson v. *Sanger*, id. 139; *Lamb* v. *Harris*, 8 Ga. 546; *Trigg* v. *Read*, 5 Humph. 529; *Haywood* v. *Cope*, 25 Beav. 143."

In addition to the authorities cited at the conclusion of the foregoing opinion, counsel refer to the following:

In the case of *Kinney* v. *The Con. Va. Mining Co.*, 4 Sawyer, 382, the case of *Grimes* v. *Sanders* is cited and followed, and the language of the opinion is quoted.

In the case of *Hunt* v. *Hardwick & Co.*, 68 Ga. 100, which was an application to a court of equity for relief against the purchase of a stock of goods on the ground of mistake, the court say (p. 104):

> "So, a mistake or fraud from which a party seeks relief must not have arisen from negligence, or a blind and unsuspecting confidence, where the means of knowledge were easily accessible. The party complaining must have exercised at least that degree of diligence which may be fairly expected from a reasonable person."

Reference is also made to the case of *The Township of Churchill* v. *The Township of Cummings*, 51 Mich. 446, 451; and to the case of *Persinger* v. *Chapman*, 93 Va. 349, 352.

Without repeating, but again referring to the American cases cited and discussed (*supra*, pp. 33 to 35), a renewed consideration of the American cases cited by the appellee below will be had, confining such consideration entirely to the question of relief given by such courts upon the ground of accident or mistake.

The case of *Sanborn* v. *Woodman et al.*, 5 Cushing, 36, did not at all touch the jurisdiction in question here. The court say (p. 41):

> "And there is clearly no distinction in principle, or in the authorities, between a forfeiture for the non-payment of rent, and the forfeiture in the present case for the non-payment of interest."

The case of *Hancock, Administrator*, v. *Carlton*, 6 Gray, 39, was one in which relief was refused on the ground of laches. The report of the commissioner, which was confirmed by the court, says, at p. 56:

> "But inasmuch as, in equity, the non-payment of money at the precise time fixed may be sometimes explained and excused by circumstances of accident or mistake, the plea was not held absolutely sufficient if any such circumstances should appear, upon the proof of the plea, to show that such non-compliance with the condition of the deed, by the payment of the interest or principal of either of the mortgages mentioned in the said condition, could be explained or excused."

Thereupon the commissioner proceeds to set out the evidence adduced to prove these circumstances of accident or mistake. He says (p. 57):

> "Both Clark and Hancock had constructive notice of the existence of said mortgages, the persons to whom they were due, the amount due, and the times therein respectively fixed for the payment of interest and principal, because they were enumerated in the deed under which they claimed. It was further proved that Hancock, in his lifetime, had actual notice that some of these mortgages had become due, and were unpaid, and that Carlton relied on the condition of his deed for their payment; but no step was taken by him in his lifetime. . . .
>
> "The ground relied on to take this case out of the direct operation of the condition, on the ground that, in equity, performance at the day was not necessary, was a mistake of the law by Hancock, namely, that he took the deed of Clark under a mistaken belief that, in law, such a condition, being substantially a condition for securing the payment of money, though contained in the condition of a deed from grantor to grantee, in favor of the grantor, was yet a security, in the nature of a mortgage, and that he would have the

term of three years, from the time of condition broken, to redeem. . . .

(P. 58):

"But I was of opinion that this mistaken opinion, in regard to the nature and character of his own title, if it existed, being an opinion of his own rights, which was strongly pressed upon the consideration of the court in the former argument upon the sufficiency of the plea, was not such a mistake as could be relieved against in equity. It was not an accident or mistake caused, or in any way promoted, by the defendant. He took an invalid title; he has contended for the correctness of it to the end, and it has been decided against him. The defendant can not be restored to his legal rights by any payment of money which can now be made."

The case of *Mactier* v. *Osborn*, 146 Mass. 399, was, as has been said, a case in which the opinion was based upon the overruled case of *Sanders* v. *Pope*. The court say (p. 402):

"In the case at bar, where the former policies, which were satisfactory to the lessors, expired, the lessee in good faith intended to have them renewed in the same amounts and form. By accident, or by a mistake of the insurance brokers, they were renewed in a form which does not fairly meet the requirements of the covenant. This was not wilful or voluntary on her part. *It was not an accidental forgetfulness to renew the policies.* The property has been all the time fully insured. It was an occurrence not anticipated by her and not known to her until after the demandant entered to enforce a forfeiture. No misconduct or culpable fault can be attributed to her. The lessors have not in fact been injured by the accident and can now be put *in statu quo.* It is against equity and good conscience that the demandant should insist upon a forfeiture of a valuable leasehold estate."

This case is really in favor of the appellant. So, also, is the case of *Lundin* v. *Schoeffel et al.*, 167 Mass. 465. This case has already been sufficiently commented upon (*supra*, p. 36). It may be well, however, to add these words of the court. In referring to the preceding case of *Mactier* v. *Osborn*, the court say:

> "The precise question now before us did not arise in that case. The omission in this case is not of the same character as a failure to repair when waste is going on, or to insure. It is merely a failure to pay out money, and is much like an omission to pay taxes, which, in the absence of bad faith, and where the position of the parties has not been changed, and no new rights have intervened, has been held not to bar the lessee from relief. *Giles* v. *Austin*, 62 N. Y. 486; *Noyes* v. *Anderson*, 124 N. Y. 175."

The reasoning of this case is really in favor of the appellant. The *obiter dictum* reference to taxes is one ill considered, the attention of the court not having been drawn to the dangerous character of an omission to pay taxes. The *obiter dictum*, however, has no application in the case at bar, since the limitations to the general statement have all occurred in this case. So far as the Massachusetts cases are concerned, their reasoning is in favor of the appellant and not of the appellee.

Coming to the New York cases, they all rest upon the principal case of *Garner* v. *Hannah*, 6 Duer, 262. In that case breach had been made in the payment of both general and special taxes, and in consequence thereof there had been tax sales, which were redeemed by the lessee. From the statement of the case at pp. 262–265, it does not appear that the lessee relied upon any special facts to excuse his breach. The case is, therefore, to be taken from the language used in the opinion of the court at p. 274, as a broad assertion that the covenant to pay taxes is identical in legal effect with the covenant to

pay rent, and that the court will relieve without any reference to fraud, accident, or mistake in the case of failure to pay taxes, as it undoubtedly does in the case of failure to pay rent. Such a decision cannot be supported in reason, nor by any well-considered authority.

In the case of *Giles* v. *Austin*, 62 N. Y. 486, the broad doctrine of *Garner* v. *Hannah* is affirmed, without reference to the equitable jurisdiction which we are discussing here.

In the case of *Noyes* v. *Anderson*, 124 N. Y. 175, this doctrine is reasserted. The opinion of the court (p. 179) goes upon the power of a court of equity to relieve a party against forfeitures and from penalties. It is said:

> "This relief will not be afforded in cases where the default and forfeiture have been occasioned by the wilful neglect of the party seeking it."

The special circumstances upon which relief was granted are thus stated (p. 182):

> "The trial court found that the previous nonpayment of it (the tax) was owing solely to the negligence of the defendant's son, and agent, Henry S. Anderson. The facts bearing upon that subject are undisputed. There is nothing in the evidence to permit the inference that the defendant did not intend to promptly pay all taxes and assessments on the property. She left that matter in charge of her son, who resided in the city, and she was away from there. He paid the taxes in 1886, and had in his hands the defendant's money with which to pay such charges, and sufficient to pay the assessment during the time it remained unpaid, and the only reason of his failure to pay it was that he did not know that it was made or existed. It appears that he might have ascertained about it at the office of the clerk of arrears. But when he paid the tax of 1886, at the tax office in the city, the son was, upon his inquiry, informed

by some one in the office that there was no sum due or in arrears against the property.

"It is clear that the purpose of the defendant's son was to pay the taxes and assessments, and that his failure to make an earlier payment in this instance was not wilful neglect on his part, nor was the plaintiff prejudiced by it."

Of these New York cases generally it is to be said that against reason and against English and American authority they ignore the distinction between the failure to pay rent and the failure to pay taxes. They determine that a failure to pay taxes is to be relieved in all cases in which a failure to pay rent is relieved. This entirely gets rid of the doctrine of relief on the ground of accident or mistake, and merely asks the question whether or not the suitor, applying to a court of equity for relief, has been guilty of such wilful negligence as would bar him in any case in such court.

The case of *McClarty* v. *Gokey*, 31 Iowa, 506, does not at all touch the jurisdiction which we are now considering.

The case of *South Penn Oil Co.* v. *Edgell*, 48 W. Va. 348, is the one that is criticised in Pomeroy's treatise, and was decided, as has been already said, upon its special circumstances. The reasoning of the court, at p. 351, is all directed towards the broad proposition of *Garner* v. *Hannah* (*supra*), which it adopts. The statement in the opinion, at p. 350, as follows, "the breach in this case came from a negligent mistake, but it was not wilful in a legal sense. To be so it must be knowingly committed," is against the whole weight of authority.

The case of *Tibbetts* v. *Cate*, 66 N. H. 550, is not reasoned, and is a reassertion of the doctrine of *Garner* v. *Hannah*. The court state, at p. 552, the facts as follows:

"The facts are found, that the plaintiff's refusal

> to pay the taxes when called upon was in consequence of her ignorance of her rights and duties in the matter; that she was ignorant of the ways of doing business; that she understood that the tax bill ought to be made out in her name, and that if she paid the taxes she was entitled to a receipted tax bill made out in her name, and that she believed she was entitled to a deed of her interest in the premises, and applied to the defendant for such a deed. It appears that she offered to pay the taxes for 1888 to the collector if he would give her a tax receipt in her own name, and that she requested the selectmen to tax the land to her in 1889.
>
> "Under these circumstances the refusal of the plaintiff to pay the taxes of 1888 and 1889 was not in any true sense wilful, and she is entitled to the relief prayed for."

It is a satisfaction to those who know the reputation of Jeremiah Smith, Esq., late a justice of the Supreme Court of New Hampshire, that he did not sit in this case. The broad doctrine that ignorance of the law is an excuse for violating a covenant would seem to be declared in the New Hampshire case.

The case of *Kopper* v. *Dyer*, 59 Vt. 477, is the only one of the cases cited in which there is any attempt to adequately review the authorities. The decision quotes as authority the overruled case of *Sanders* v. *Pope*, and other English authorities which are overruled by later decisions hereinbefore referred to. The American cases cited in support of the opinion (p. 484) are all cases in which some unusual circumstances, entirely external to the party applying for relief, happened to prevent him from doing a thing which he had made all reasonable preparations to do. Relief was granted to the plaintiff in the case because of the special facts set forth at page 487 of the opinion, which show the preparation that he

had made to discharge his contract. At page 488 the court, after reciting these facts, say:

> "On these facts, and the others disclosed by the record, Kopper can not justly be charged with negligence. The means he had taken to obtain the money rendered it reasonably certain that he would succeed, and that he was anxious to obtain it abundantly appears. That he did not meet Martin at eleven nor at two, was an unforeseen and an unexpected occurrence, external to himself, of which his agency was not the proximate nor even the remote cause, and thereby he was prevented from sending his money seasonably in a form that would have been treated as payment, whereby, contrary to his own intention and wish, he lost his legal right to pay, and Dyer acquired a legal right not to have him pay; and in these circumstances, Kopper is entitled to relief that will reinstate him in his former position, on terms that he satisfy the equitable rights of the other party."

The case of *Eichenlaub et al.* v. *Neill*, 3 Ohio Dec., p. 365, has already been referred to. It is a decision of the Circuit Court of Ohio for Franklin County, and was pronounced by Shearer, Summers, and Allread, JJ. It is a decision which contains a more careful review of the authorities than many of those which are cited of higher courts. The covenant whose breach had brought about the forfeiture sought to be relieved was a peculiar one, in that it provided that certain taxes which were covenanted to be paid should constitute a further rent for the premises demised. The opinion considers, in the first place, the necessity for a demand, and, after reviewing the authorities upon which the appellee's counsel relies in this connection, holds as follows:

> "A demand being necessary to forfeiture for non-payment of rent, we think it should be also for non-payment of taxes; but we are not satisfied that such is the law. The cases above referred to

> do not seem to be well considered; the statements are in the nature of *dicta;* no authorities are cited, and they cannot be held to settle the question; nor do we think it necessary to pass upon it. The plaintiffs file their petition asking to be relieved from the forfeiture, and the matter we are to determine is whether they have made out a case entitling them to relief."

The court then proceed to consider certain of the English cases hereinbefore cited, and come to the conclusion that—

> "wherever a penalty or forfeiture is inserted merely to secure the payment of money or the performance of some act or the enjoyment of some right or benefit, equity regards such payments, performance, or enjoyment as the real and principal intent of the instrument, and the penalty or forfeiture as merely an accessory, and will, therefore, relieve the debtor party from such penalty or forfeiture whenever the actual damages by the creditor party can be adequately compensated."

The court then proceed to consider the equity jurisdiction of surprise, accident, etc., and upon this subject say as follows:

> "Counsel discuss the questions of surprise, unavoidable accident, conduct on the part of the lessor tending to mislead. These do not lie at the foundation of the doctrine. Mr. Pomeroy, in a note to the last above section, says:
>
> "The doctrine of equitable interference to relieve against penalties and forfeitures has been described and discussed by some writers as a branch of the jurisdiction in cases of accident. In very ancient times, when the powers of the court of chancery were restricted by the language of the royal decree to certain specified heads, as good faith, fraud, mistake, and accident, and it was necessary that every new exercise of power should

> be referred to some one of these heads, it may have been implied that the jurisdiction over penalties belonged to the head of accident, but it is evident that this is not the true source of the jurisdiction. There can be no pretense of any accident in the execution of agreements containing penalties. The doctrine has a deeper foundation in universal principles of right, as shown in the preceding chapter.'"

The opinion then cites the cases of *Noyes* v. *Anderson*, *supra*; *Mactier* v. *Osborn*, *supra*, and ends by repudiating any question of accident or mistake in the case, and puts its decision squarely upon the point that the covenant to pay the taxes was intended merely to secure the fulfilment of the contract, and not to enable one party to profit by the default of the other, or to obtain a collateral advantage which was no part of the main design. The court say explicitly:

> "We do not think it was of the essence of the contract that the taxes should be paid on the twentieth days of June and December. The premises could not be sold at tax sale until the sixteenth of January. On the fifteenth Goldstein tendered them to the treasurer, and on the same day tendered to Mr. Neill the amount he had paid, with interest. The rent and taxes since falling due have been tendered, and the plaintiffs in their petition say that they are ready and willing to pay to the lessor any loss, cost, or damage or expense which he may have been put to by reason of any neglect or omission in the punctual discharge of said taxes and assessments, and that they are ready, able, and willing to abide by any order which the court may make in the premises."

If this case is authority for any proposition, it is authority for the broad proposition of *Garner* v. *Hannah*.

We submit upon this point that unless the court shall believe the testimony of the witness Rodgers as to al-

leged representations made by him at the Tax Office of the District of Columbia in May, 1901, and confining our consideration to what had happened prior to that date, no facts have been shown which would bring the complainant within the protection of any of the foregoing cases cited below by her counsel save, *upon a superficial view*, that of *Noyes* v. *Anderson*, in 124th N. Y.

Lessee Continued Breach After She Knew Tax Sale Was Irredeemable—Here Was no Accident or Mistake.

It is submitted, however, that the negligence of the lessee in this case is not helped by the decision in *Noyes* v. *Anderson*. In that case there was one default, and the special circumstances were connected with that. In the case at bar we are dealing with many defaults, beginning in 1898 and continued to 1900

We are also dealing with a man thoroughly conversant with tax defaults, tax sales, and tax redemptions. Harry King *systematically made default in payments of taxes on property of the estate of his father, the original lessee.*

It appears from the testimony of the witness Rodgers (Rec. p. 134), as follows:

> Q. When was it you first learned anything about these other tax bills that you produced here, the tax bill for 1898 and the one for 1899 ?
>
> A. When I went to pay this check, No. 7923, on May 24, 1901.
>
> Q. That is your second visit to the office ?
>
> A. Yes, sir; on this amount (account). I have been there hundreds of times. It was the second time on this branch bill.
>
> Q. Between those times, July 24, 1900, and May 24, 1901, how often had you been to the tax office ?
>
> A. Probably fifty times.
>
> Q. About what ?

A. About property Mr. Harry King was receiver for, all over the city, northwest, northeast, southwest, and southeast.

Again (Rec. p. 136):

Q. What other taxes did you pay in May, 1901?

A. I couldn't tell that exactly. I was paying taxes all the time. The Kings own property all over the city, coming due at different times, etc., from the rents they were receiving. There would hardly be a month that I wouldn't be paying taxes.

(Rec. p. 137):

Q. How many hundred times do you think you went down there?

A. I couldn't say. In the two years that I was with King I don't think there was ever a week that I wasn't there.

The witness, Harry King, testifies as follows (Rec. p. 186):

A. We allowed a good many debts of the estate to go by. Some of the interest was not paid promptly and the taxes were not paid promptly.

Q. That was on your father's property?

A. Yes.

Property of Estate Sold at Tax Sales.

(Rec. p. 192):

Q. I think you said there were some forty pieces of property belonging to that estate (estate of original lessee)?

A. Yes, sir.

Q. And to that receivership?

A. In the neighborhood of that number.

Q. Have you any idea of the number of those pieces of property that were ever sold at tax sale?

A. No, sir; I have no idea of the number of them that have been sold.

Q. Can you tell whether there were three or thirty?

A. There were some sold at different times, which were redeemed whenever we got the money. Unfortunately the estate did not have much money.

Q. Don't you know whether there were three or thirty?

A. Don't try to tie me down to any certain number. I can merely tell you that at times there were various pieces of property involved in the non-payment of taxes which the receivers did not have the funds to meet.

Q. You can not tell me whether you redeemed as many as three sales?

A. Yes; a great many more than that.

Q. Do you think you redeemed as many as ten?

A. Possibly.

Q. Have you any idea how many were redeemed between the commencement of the receivership and the spring of 1900?

A. No, sir; I can not tell you.

Q. Had any of those arrears of taxes subsisted prior to your father's death?

A. Yes, sir.

Q. Had you had anything to do with paying the taxes on his estate during his lifetime?

A. As I have stated before, I occasionally paid the taxes.

Q. For him?

A. Yes, sir; of course.

Q. And you got the tax bills?

A. I suppose they are at the store.

Q. I want to know whether you actually went to the tax office and got the tax bills, and paid them during your father's lifetime?

A. Once in a while; yes, sir.

Q. Can you tell us whether or not any of the property was ever sold for taxes, and redeemed, in his lifetime?

A. I think it was.

Q. For how long a time before his death had there been default and arrearages of taxes?

A. That I could not answer.

Q. Can you say whether it was three years or five?

A. I can not answer you that. It might have been six months, and it might have been a year; I can not say.

Q. How old are you?

A. I am thirty-eight years old.

. . . . . .

Q. You say you knew Mr. Wiltsie as a tax speculator?

A. Yes, sir.

Q. How long had you known him to be a man engaged in that business?

A. That I could not say.

Q. Could you say whether it was a month or six months or a year or three years?

A. I think it was a few years.

Q. Had you ever had any transactions with him in your father's lifetime?

A. I never had to my knowledge.

Q. Do you know of your father ever having had any?

A. That I could not say.

Harry King Had Redeemed Other Tax Sales From Wiltsie.

All doubt upon this matter is removed by the witness' own letter to Wiltsie (Rec. p. 56), dated September 21, 1901, from which we make the following extract:

> In view of the fact that the penalties on this property are heavy and the amount for which it was sold was very small, I think that a redemption of $50 would be about just and equitable. I hardly think it is your desire to squeeze us or to be unreasonable. *Unfortunately we have paid you quite a considerable amount of money in the past for tax sales.* We are not interested in this piece of property in any way except as tenant, as we are not the owners or the mortgagees. If it should meet with your approval send us a bill and we will send check.
>
> Respectfully yours, HARRY KING.

It is apparent from the foregoing testimony that the taxes on the property in question here were not paid from December, 1897, until July, 1900, not by reason of any mental distress on the part of the financial manager, Harry King, or from any lack of knowledge on his part that the lessee was bound to pay them, or from any misconception that Mrs. Kennedy expected to pay them herself and have the lessee reimburse her, as she had done in the lifetime of the original lessee. He knew well that she expected them to be paid directly by the assignee of the lease.

No complaint was made in the bill that he was misled. None was ever made to Mrs. Kennedy during her lifetime; none was made to Webb after her death. The fact that these taxes had not been paid and that Wiltsie had got an irredeemable tax title in consequence was carefully suppressed, and Harry King dealt with Wiltsie at his lessor's risk and while she was ignorant of his repeated breaches.

This is the more remarkable because Wiltsie had said to Harry King, in his letter to the lessee of July 24, 1901:

> "I am informed that you are interested in the premises as owner or mortgagee. If I am wrongly informed I shall esteem it as a favor if you will kindly state that fact, *and give me the name and address of some interested party*" (Rec. p. 285).

We submit that here is no case of accident or mistake under any authority hereinbefore cited.

But the facts occurring subsequent to July 24, 1901, render the preceding argument and authorities irrelevant. On this date Harry King received Wiltsie's letter notifying him that he held an irredeemable tax title to the demised premises. All questions of accident, inadvertence, and mistake now disappear.

If he had been misled by Mrs. Kennedy's prior conduct in herself paying the taxes prior to his father's death,

now was the time to make the claim. It was not made. The default and its consequences are not communicated to Mrs. Kennedy, and her counsel, Webb, only learns it by accident late in the following September.

Of Harry King's conduct from July 24 to October, 1901, the Court of Appeals say (21 App. D. C., p. 149):

> "With reference to the first of these questions, notwithstanding that the complainant in the cause should have found it to be *to her best interest* not to higgle with the holder of the tax certificate for the comparatively small difference between them we fail to find, as matter of law, at this stage of the case that there was any such delay or laches on her part as would preclude her from relief in equity. It is evident that her failure to pay the taxes in the first instance was due, as she states, to inadvertence, *since she paid all the subsequently accruing taxes* down to the time of the filing of her bill. And we can not hold that her delay in redeeming the tax certificate was wholly unreasonable, in view of the fact that she had been advised that the sale for taxes was invalid."

The italics in the above extract are ours. We venture to ask where, in the two opinions of the Court of Appeals in this case, are the interests of the lessor made a subject of judicial consideration? We further suggest that the record shows that from the assignment of the lease, in August, 1897, to October, 1901, the only instalment of taxes which was paid when due was the one accruing due and payable in May, 1901.

Every other tax accruing due during this entire period was either not paid at all or only after it had become in default and subject to penalties, and in some instances by way of redemption after a sale of the property for such default (Rec. pp. 168–9, 170, 187–9, 279–284).

In addition, the taxes on the rear portion of the demised premises were not paid at all, although they were

within the lessee's covenant. In this connection the court should not be misled by the language of the stipulation of counsel (Rec. p. 482) to the effect that Mrs. Kennedy paid certain taxes on this rear part of the demised premises. The court will see that these taxes were all paid on October 14, 1901. They were in default and were then paid by Webb (Rec. pp. 82, 86, 99, 295). The date of payment, October 14, 1901, was long subsequent to the defaults of the Kings, as the stipulation itself shows. The circumstances of the payment are explained in the final paragraph of Webb's letter of October 14, 1901, to Darlington and Tobriner (Rec. pp. 294–295).

We respectfully submit that under these circumstances all suggestions of accident and mistake disappear from the case. From July 24, 1901, Harry King took, without authority, from the lessor, and while she was ignorant of the dangerous situation, the risk of Wiltsie's disposing of his irredeemable tax title to any third person to whom he might choose to transfer it. Did he not thereby waive all questions of accident, inadvertence, or mistake, as well as all claims that Mrs. Kennedy had misled him? It is true that he says he had the advice of Mr. Tobriner that the tax sale was invalid. Did this justify him, *without her knowledge or authority*, in subjecting her to the danger of losing her property, worth, on the estimation hereinbefore given, $80,000, or, if his own statement be preferred, worth $50,000?

It would seem that no subsequent events could affect the situation which we have up to this point.

Here is a breach of covenant which has resulted in a third person's acquiring an irredeemable tax title to the demised premises without any fault on the part of the lessor.

How can any subsequent event legally alter this situation?

It is sought, however, to alter it by what counsel for

the lessee suppose to be a charge of fraud against the defendants, Webb, Cohen, and the Kanns.

Consideration of Charges of Fraud.

Before we consider this charge let us briefly inquire what the rights of the lessor were when through her counsel, Webb, she learned of the situation late in September, 1901.

What could Webb, acting for the lessor, legally do to relieve that situation?

The answer to the question is given in the opinion of the Supreme Court of Utah in the case *Bacon* v. *Park* (*supra*). In that case the lessor when he learned that the lessee had broken his covenant to pay taxes, that in consequence thereof his (lessor's) property had been sold for taxes, and that the time for redemption had nearly expired, at once forfeited the lease, and made a new lease to a third person by which he raised the money required to redeem the property from the tax sale. Of his action the court says:

> "The plaintiff was aware of the covenants in the lease relating to forfeiture. He knew that default had been made in the payment of taxes for several years (the deficit for taxes amounted to about $4,000), and that the premises had been sold for the non-payment of the same; and that the time to redeem had nearly expired, yet he did not intend to redeem until the last day. Such intention and such delay was a gross violation of the covenants of the lease. The evidence shows that Mr. Park was in straightened circumstances. His property was in danger of being sacrificed for the non-payment of taxes. By forfeiting the lease he ascertained that he could raise the money necessary to redeem the property, by releasing the same. It would have been reckless on his part to let such an opportunity pass, and it was absurd for the plaintiff to expect that the lessor

> would not assert his right of forfeiture for the non-payment of taxes until the last day for redemption of the same from the tax sale."

It is difficult to conceive how the law could be otherwise.

Webb could have himself redeemed this tax sale from the proceeds of a new lease to the Kanns, or to any one.

The lessor's motives for declaring a forfeiture are, from a legal point of view, absolutely immaterial.

If Webb had not the necessary money himself, he could have dealt with the situation in any manner that seemed best to him, and it would not have lain in the lessee's mouth to complain of him.

Let us now consider the subsequent events as they followed:

As these events will be subsequently given in detail, only a brief statement of them will now be made.

When Webb learned from Knight of the situation he verified the latter's information and then told Mrs. Kennedy of it. She expressed anxiety as to getting a new tenant. Some months before the Kanns had said casually to Webb that they would pay more rent for the premises. Bearing this in mind Webb went to see Cohen, their attorney, and learned that the offer was still open. At this interview Webb told Cohen that the tax title was irredeemable and who the purchaser was. Thereupon, Mrs. Kennedy determined to forfeit the lease and sent the lessee the letter of October 1, 1901 (Rec. p. 20). Cohen determined to himself buy the tax title and, against Webb's remonstrance, did in fact buy it with the purpose of holding it over the lessor to compel the new lease to the Kanns. His and Webb's acts in this regard will be fully considered later.

When the lessee received Mrs. Kennedy's letter declaring the forfeiture, she retained her present counsel,

Messrs. Darlington and Tobriner, and a long correspondence ensued between them and Webb, a careful reading of which is necessary. The letters are in sequence of date as follows :

Darlington & Tobriner to lessor, October 8, 1901 (Rec. p. 21).

Webb to Darlington & Tobriner, October, 10 1901 (Rec. p. 21.)

Darlington & Tobriner to Webb, October 12, 1901 (Rec. p. 22).

Webb to Darlington & Tobriner, October 14, 1901 (Rec. p. 23).

Lessor to Darlington & Tobriner, October 14, 1901 (Rec. p. 24).

Tobriner to Webb, October 17, 1901 (Rec. p. 86).

Webb to Tobriner, October 18, 1901 (Rec. p. 295).

Tobriner to Webb, October 22, 1901 (Rec. p. 86).

Webb to Tobriner, October 22, 1901 (Rec. p. 87).

Lessor to lessee, October 22, 1901 (Rec. p. 87).

Webb to Darlington, October 29, 1901 (Rec. p. 428).

Darlington to Webb, October 29, 1901 (Rec. p. 428).

Webb to Darlington, October 29, 1901 (Rec. p. 429).

Webb to Darlington, October 30, 1901 (Rec. p. 87).

Darlington & Tobriner to Webb, November 1, 1901 (Rec. p. 89).

As appears from these letters the lessee was down to a certain point requesting the lessor to permit the use of her name in litigation for the purpose of avoiding the tax title, and was promising full indemnity from the tax sale and payment of all costs and counsel fees which the lessor might incur in complying with this request. It further appears that about October 22, 1901, the granting of a new lease from the lessor to the lessee upon new terms was under discussion. Finally, on October 30, Webb makes a proposition of compromise, and on No-

vember 1 Darlington and Tobriner reply. This is a very important letter. It abandons all thought of indemnity and threatens litigation.

What is more serious, it contains what its writers apparently thought were grave charges against Webb (Rec. pp. 89–91). Otherwise they could hardly have used to Webb language contained in that letter.

The court will observe in its fourth paragraph the following words: "*We know clearly, and are able to prove, the following facts.*" Then follow four propositions of fact. At the close of the next paragraph is the following sentence:

> "*In other words, that Mrs. Kennedy, personally and through agencies invoked in her behalf, actively prevented the redemption of the tax certificate, and actually procured its withdrawal from the bank here in Washington where it had been deposited for the purpose of being redeemed.*"

Then follows this assertion:

> "*These now undisputed facts create the inevitable alternatives following:*
>
> "1. That the purchase was made by Mr. Cohen on behalf of the Messrs. Kann with an understanding or agreement between them and Mrs. Kennedy, acting either personally or through her representative, that the tax deed should not jeopardize the title to her property, or—
>
> "2. That Mrs. Kennedy, or her representative, stood by acquiescing, by inaction if not affirmatively, in the purchase of the tax deed to her property, without protecting her in any way from the loss of her property through the said transaction—and that this was done well knowing at the time that the slightest intimation to Mrs. King of the proposed purchase of the tax certificate would have led to instant protection against such a contingency."

Next is this statement: "*The latter of these alternatives, it seems to us is wholly inconceivable.*" Then follows a sentence which, in view of the fact that the writers clearly understood that Mr. Webb was the person who had acted for Mrs. Kennedy, as her advisor, is most offensive to him:

> "*You will pardon our speaking very plainly upon this subject, as we do so in the sincere desire to state the matter with absolute frankness, now, before litigation begins, in order that the full bearing of the case may be appreciated before it may be too late to avoid any unpleasant consequences which may arise.*"

Then ensues this sentence:

> "*Making, further, a frank disclosure to you of our present views of this case, we beg to say that, in our opinion, Mrs. King has, now, two defenses: namely, the defense of irregularity of the tax proceeding, and of her equitable right to be relieved against the forfeiture, under the circumstances, and, secondly, a defense in a court of equity against the methods above mentioned for depriving her of her lease, and of her right to apply to a court of equity for relief against the forfeiture.*"

It would seem that counsel for the plaintiff clearly meant by their language, above quoted, to assure Mr. Webb that in order to prevent any unpleasant consequences which should arise to himself, they were going to be perfectly frank with him and to state that if they were driven to litigation they would prove facts within their power to prove, and really undisputed, from which two alternatives would arise, one of which was inconceivable and the other of which was that he had knowingly colluded with the defendant Cohen in the purchase of the tax title in question. We must, therefore, assume

that the charge made against the defendant Webb is as has been stated. When we come to consider the charge made in the bill (Rec. p. 6) we find that language is used which could have been intended to have no other meaning than the charge made in the letter. The language used in the bill is as follows :

> "The complainant is further advised and believes, and therefore avers, that it never was contemplated upon the part of either the defendants, Marianne A. B. Kennedy, or the defendants, Kann, that the said tax certificate should be purchased for the purpose of using the same adversely to her or in any manner to endanger her title to the very valuable property in question; that an agreement or understanding, whether expressed or tacit, existed between them that the said tax title should be used only in furtherance of the common design to have the complainant's lease forfeited by reason of her inadvertent omission to pay the single instalment of tax in question, and thereupon to dispossess her and to have the defendants, Kann, enter upon and take possession of her said premises as tenant of the said Marianne A. B. Kennedy, at an increased rental."

The bill further avers that this agreement or understanding was of such an improper nature that the defendant Cohen was unable to sleep during his night journey to Rochester, N. Y., by reason of doubts as to the propriety of this understanding (Rec. p. 6).

There can be no question, then, that the answer is intended to charge upon the defendant Webb the same (in their opinion) illegal and dishonorable conduct that the letter of counsel imputes to him. When the witness Tobriner was upon the stand he was asked the question (Rec. p. 245) whether or not he understood that charges of collusion in this connection against Webb were made

by the bill. As counsel consider the colloquy in that connection of importance, they here print it in full:

Cross-examination by Mr. JOHNSON:

Q. Mr. Tobriner, you signed with Mr. Darlington, as solicitor for the complainant, the bill of complaint in this cause? A. Yes, sir.

Q. Did you take part with Mr. Darlington in its preparation? A. Yes, sir; to a certain extent.

Q. You were aware at that time of the facts as to which you have testified, occurring antecedent to the filing of the bill, of course? A. Yes.

Q. In view of any objection made to some of your testimony, and the suggestion of counsel with regard to it, I will ask you to state, if you can, what, if any, part of the bill in this case charges collusion between Mr. Webb and Mr. Cohen or the defendant Kann, with respect to the acquisition or use of this tax certificate from Mr. Wiltsie?

Mr. DARLINGTON: I object to the question and advise the witness not to answer it, my objection being that it calls for no testimony or evidence of facts within his knowledge, but simply asks for his construction of the bill in this case.

Mr. TOBRINER: I wish to add that I am simply here as a witness, and would not feel that I ought to argue the case from the witness stand.

By Mr. JOHNSON:

Q. Do you claim that there is any collusion, or do you say that you believe there was any collusion between them?

Mr. DARLINGTON: I object on the ground that Mr. Tobriner is placed here to state what he knows about the facts in this case, and not to state what his claim will be as counsel in the case. I advise that he decline to answer on that account.

By Mr. JOHNSON:

Q. Is it not a fact that in the preliminary hearing of this case before Mr. Justice Clabaugh, on the motion for an injunction, that the court asked if you claimed that Mr. Webb and Mr. Cohen and the Kanns were in collusion in this matter, and

that you disclaimed any such charge? A. I do not recall that the court asked the question, and I do not recall that we disclaimed it.

Q. Do you not recall that that was one of the subjects argued then, and that the judge laid considerable stress on the absence of any such claim in the proceedings? A. I do not.

Q. Do you recall that in the course of the argument Mr. Darlington also admitted that they did not charge such collusion between Mr. Webb and Mr. Cohen or the Kanns? A. I do not.

Q. Or that there was any conspiracy between them, to accomplish anything? A. I do not so recall.

Q. Do you recall Judge Clabaugh saying that the bill did not charge conspiracy between them, and the disclaimer on your part and that of Mr. Darlington?

Mr. DARLINGTON: I object, because, in the first place, this is not calling for evidence of facts in the case, and, secondly, because what took place between counsel and the court at the argument of the motion for an injunction *pendente lite* is not a proper subject for cross-examination of this witness, and for the further reason that Judge Clabaugh's opinion in the case is in writing, and I think it will be found to contain no such statement. I am quite willing that the opinion may be offered in evidence to show whether I am right or wrong about this.

In view of the failure of Mr. Tobriner to answer, and of the objections of Mr. Darlington to his answering this question, counsel for the defendant Webb are compelled to assume that the charge made in the letter referred to and in the bill is a charge intended to be made in the bill and claimed to be sustained by the testimony.

While upon the argument below counsel asserted that they intended to make no attack upon Webb, they did not withdraw these charges.

Most extraordinary of all, while Webb, in his sworn

answer and in an affidavit, had used the strongest language, denying the charges of this letter (Rec. pp. 80, 81), and while he had as emphatically denied this in his testimony (Rec. pp 288, 302, 312, 313–315, 324, 325), and while Cohen has made the same denial (Rec. pp. 361, 364, 365); yet the Court of Appeals, while acquitting all parties of any improper conduct, uses the following language (25 App. D. C. 188), which can have only one interpretation :

> "3. The defense of multifariousness in the bill of complaint is again insisted on, as it was at the former hearing. But we think that what we said at that former hearing must suffice to dispose of the objection now. The determination of that question depends upon the inquiry as to whether there was an arrangement, or understanding, or combination, or whatever we may call it, between the defendants to the suit, whereby the tax certificate that had been issued against the property involved in the proceedings was to be acquired and used in the interests of the Kanns to coerce the appellee out of the property, and to enable the Kanns to become the possessors or lessees of it. We find no evidence whatever in the record of any fraud or wrongdoing perpetrated by any one concerned. We only find the evidence of a situation created by keen commercial rivalry and shrewd management, wholly untainted by wrongdoing, but still a situation from which injury is threatened to the complainant's rights of property, and against which she is entitled to be relieved. For that there was an arrangement between the defendants whereby the tax certificate was to be used to oust the complainant from the property, we think is too plain to be reasonably questioned. There was, undoubtedly, a concurrence of effort for that purpose, perhaps no formal combination or preconcerted action. But it matters not what we call it. The undoubted fact is, that there was cooperation between the defendants to use the tax certificate to the detriment of the

complainant's rights; and, there being such cooperation, the defense of multifariousness can not avail. The one purpose of the bill is to relieve the complainant from the effect of this tax certificate and of the tax title based upon it."

It is most earnestly contended on behalf of the defendant Webb that there is not in the whole case one word of testimony to justify this finding as against the oaths of Webb and of Cohen Before considering in detail this testimony let us say this as to charges of fraud generally:

Inasmuch as the charge against the defendants is that of actual fraud, recovery must be had upon that ground or not at all. The Supreme Court of the United States has followed the leading English case of *Price* v. *Berrington*, 7 English Law and Equity, 254. In the case of *Eyre et al.* v. *Potter, et al.*, decided by a unanimous court in the year 1853 (15 How. p. 42), the court say (p. 56) as follows :

"And here it may be proper to premise, that in the examination of the case made by the bill, it can not be considered as one of constructive fraud, arising out of some peculiar relation sustained to each other by the complainant and the defendants, and, therefore, to be dealt with by the law under the necessity for protecting such relation, but it is one of actual, positive fraud, charged, and to be judged of, according to its features and character, as delineated by the complainant, and, according to the proofs adduced to establish that character. Although cases of constructive fraud are equally cognizable, by a court of equity, with cases of direct or positive fraud, yet the two classes of cases would be met by a defendant in a very different manner. It seems to be an established doctrine of a court of equity, that when the bill sets up a case of actual fraud, and makes that the ground of the prayer for relief, the plaintiff will not be entitled to a decree, by establishing some of the facts quite independent of fraud, but which

might of themselves create a case under a totally distinct head of equity from that which would be applicable to the case of fraud originally stated. In support of this position may be cited, as directly in point, the case of *Price* v. *Berrington*, decided by Lord Chancellor Truro, in 1851 (vide 7 Eng. Law & Eq. 254).

"The defendants, in this case, were clothed with no special function, no trust which they were bound to guard, or to fulfill for the benefit of the complainant; they were not even the depositaries of any peculiar facts or information as to the subject-matter of their transactions, or which were not accessible to all the world, and by an omission or failure in the disclosure of which they could be regarded as perpetrating a fraud."

This case is a leading and controlling one.

The recent case of *Warner* v. *Godfrey*, 186 U. S. p. 365, is an instructive one in this connection, both upon the main point decided in *Eyre* v. *Potter*, and also to the effect that where a party had ample opportunity to accept more than he was entitled to and has refused it, he can not afterwards elect to change his attitude and accept it.

In the case at bar it will be recollected that Webb, in his letter of October 30, offered the plaintiff what she was not entitled to as a matter of right. This offer her counsel declined.

Upon the general point the court say (p. 379):

"The complainant thus having expressly declined to put an end to the litigation, upon the theory that because of the *mala fides* of Warner and Wine she was entitled to an unconditional recovery of the property, she ought not, in equity, upon the collapse of her efforts to establish fraud and bad faith on the part of the defendants, to be allowed to reform her pleadings and change her attitude towards the defendants in order to obtain that which she had expressly elected not to seek and had persistently declined to accept."

We proceed now with a detailed consideration of the testimony in connection with acts of Webb criticised by the lessee.

Consideration of Testimony on Subject of Fraud.

Let us say at the outset that the pleadings in the case contain a direct and positive denial on the part of all persons who could have had any knowledge of the facts of any collusion whatever between the defendants Webb, Cohen, and the Kanns, or any of them, with respect to the acquisition by the Kanns, through Cohen, of the tax deed in question. The testimony of the defendant Webb begins at page 286 of the record, and contains a succinct statement as to his connection with the matters in controversy. He says that he first learned that the property had been sold for taxes on the 25th day of September, 1901, from a man by the name of Charles H. Knight, who called upon him about 3 o'clock in the afternoon of that day. That same evening he called upon his client, Mrs. Kennedy, and made an engagement with her, but had no consultation with her that evening. The next day he visited the tax office and found out that the statements made by Knight were true, and that the tax sale was irredeemable. That same afternoon, about 4.30, he called upon Mrs. Kennedy and laid the facts before her. The next thing that happened was on the 27th of September, which was Friday, when he was called to New York, and wrote her a short note.

On his return to Washington he found a letter from Mrs. Kennedy in his office inquiring where she could get a new tenant. The next thing that he did was to see Mr. Myer Cohen and ask him if his clients, Kann Brothers, would take the premises at $300 a month rent if he was able to rent it to them. Cohen informed him that he would ascertain the fact and let Webb know. Cohen called at his office the same day about 1 o'clock, and said the Kanns

would take the premises if he could deliver possession. Cohen was the counsel of the Kanns, and Webb went to him as a more convenient way of communicating with them. He knew the Kanns very slightly, and once, in talking about this store, as they knew that he was Mrs. Kennedy's attorney, one of them said to him casually that they would take the store and pay Mrs. Kennedy $300 a month for it and all expenses. At that time nothing further was said about it. This conversation occurred in the month of June, 1901.

Having obtained that fact from Cohen, on the afternoon of the 30th of September, Webb went up to see Mrs. Kennedy and laid the whole situation before her. Later in the same afternoon, about 6 o'clock, he reached his house, and he found Cohen and his partner, Wolf, standing on the front doorstep. Cohen then said to him: "I have come to tell you that I am going to Rochester to buy that tax title, and we now shall deal at arms' length." Thereupon Webb asked him not to do that, but Cohen insisted upon going; whereupon Webb said: "I see no way to prevent it." Webb then said that he did not want him to go because he, Cohen, acted on information that he had obtained from Webb. Cohen then informed Webb that he had not learned this fact from him, Webb, but that Knight had been to see the Kanns before he came to Webb, and told them about it; and he also said they had sent Knight to Webb.

This is all that occurred between Webb and Cohen or the Kanns prior to the purchase by Cohen of the tax title. On page 302 the witness Webb is asked the following questions:

> Q. When and from whom did you first learn that any correspondence or negotiations between Mrs. King or anybody representing her, and Mr. Wiltsie, was in progress for the purchase of the tax certificate in question?

A. I first learned from Myer Cohen on or about the 8th day of October, 1901,

Q. It has been charged in this case that the purchase of this tax certificate by Mr. Cohen was made either at your instance or with your acquiescence. Is that correct?

A. No; on the contrary, it was made against my wishes and against my protest.

Q. It has been charged in this case that this proceeding to enforce the forfeiture of the lease, on account of the breach of the covenant to pay taxes, was forced upon the late Mrs. Kennedy and was not voluntary upon her part. So far as you know, is or is not that correct?

A. It is not correct.

It is further stated by the witness Webb (Rec. p. 357) that the compromise with the Kanns involved the surrender by them of the tax title which they held.

The testimony of the witness Cohen goes into all of the circumstances in great detail. So much of it as precedes his visit to Rochester will be found at pages 358 to 365 of the record. It will be recalled that the answers of the defendant, Webb, Cohen, and of the Kanns, all deny explicitly that there was any collusion whatever between Webb and any of them in the visit of Cohen to Rochester and in the purchase of the tax title in question. When to these positive denials there is added the statement of the only parties who came into contact with each other, viz, Webb and Cohen, the conclusion must be that the charges of counsel's letter of November 1, 1901, and of the bill, with respect to collusion, are all absolutely without foundation.

Detailed Consideration of the Acts of Webb, Cohen, and the Kanns Complained of by the Kings.

(*a*) *Offer of the Kanns in the spring or early summer of 1901 to pay Mrs. Kennedy $1,200 a year more for the premises in controversy than the Kings were paying.*

The testimony of Webb upon this point will be found at pages 305 and 306 of the record. That of Cohen will be found at pages 359 and 360. It appears that some time in May or June, 1901, Louis Kann said to Webb that if they, the Kanns, could get the property they would pay $300 a month for it and all expenses. That the Kanns had a right to make this offer can hardly be controverted. That Webb had a right to listen to it is equally certain. The Kanns were rival merchants and doubtless eager to do anything legal that would give them an advantage. Webb was satisfied that the King's lease was an extremely unfavorable one for the interests of his client, Mrs. Kennedy, and would have advised her to adopt any legal method to terminate it. Counsel know of no rule of law which made either the Kanns or Cohen or Webb guardian of the Kings. Their relations, as the law regards them, were merely and absolutely legal relations, and as such we shall discuss them.

(*b*) *Visit of Knight to the Kanns on September 19 or 20, 1901.*

It appears from the answer of the Kanns (Rec. p. 65) and the testimony of Charles H. Knight (Rec. p. 447) that the said Knight, in the latter part of September, 1901 (Webb says the 19th or 20th), called at the place of business of the Kanns and notified them that taxes on the premises in question were in arrears, and that the property had been sold for the same.

Inasmuch as counsel for the Kings lay great stress upon the fact, which will presently be considered, that later Webb informed Cohen that the tax sale in question was irredeemable, it may be well to say a few words upon facts which are so well known that the court will take judicial notice of them. By a law which has been in force in the District of Columbia for almost a century, land, taxes upon which are not paid when due, is advertised shortly

after default and sold at public auction to the highest bidder. Thereupon a certificate is issued by the District authorities to the purchaser, which certificate bears a high rate of interest, and is assignable.

These tax sales, showing the date and amount of the same, and the names of the purchasers, are matters of public record, and can be ascertained by persons desirous of so doing, at the District offices, in the office of the Recorder of Deeds, or at the offices of any company whose business it is to examine titles to real estate in the District. At any time within two years from the date of sale the owner, or any one whose interest it is so to do, can pay into the District office the amount for which the said sale was made and all interest, expenses, and penalties accruing thereon or connected therewith. At the end of two years from the date of sale these certificates become irredeemable and the holder of them is entitled to a tax deed from the District authorities conveying to him the land so sold. Therefore the object for which Knight went to see the Kanns was not to inform them that a sale had been made, but that the tax title had become irredeemable and would have to be vacated through some legal proceedings. Knight says (Rec. p. 449) that he makes a specialty of getting contracts for the annulment of tax sales, and that his purpose in calling on the Kanns was to get a contract with them for the annulment of the tax sale with respect to the premises in question. He further says, upon the same page:

> "I told him (one of the Kanns) that I wished to see the owner, or person that had control of it (the premises); that the property had been sold for taxes, and that I believed the sale was illegal."

It is denied in the answer of the Kanns that Knight said anything to them about the illegality of the sale. Knight was thereupon informed that the premises in

question were not those occupied by the Kanns, but that they belonged to Mrs. Kennedy, and that the defendant Webb was her attorney.

Recurring to the testimony of Cohen (Rec. pp. 358–9) it appears that on the 19th or 20th of September, 1901, Louis Kann informed him of Knight's visit, and that Knight had said that the premises in question had been sold for taxes and that they had referred him to Webb. At that time Cohen did nothing whatever with respect to this information, nor did the Kanns, although he says that he knew of the provisions of the Kings' lease and regarded the situation as a dangerous one for the Kings and for their landlord. His long cross-examination upon this point is absolutely irrelevant.

(*c*) *Knight's visit to Webb.*

It appears from the testimony of both Webb (Rec. p. 286) and Knight (Rec. p. 448) that, on the same day of the visit to the Kanns, Knight went to see Webb for the purpose of learning what his relation was to the owner of the property with a view of getting a contract for the cancellation or annulment of the tax sale that was against the property. As appears from the cross-examination of Cohen by Mr. Darlington (Rec. p. 382), the tax sale in question could not, nor could any tax certificate, have been of particular value to anybody until it became irredeemable. Prior to that time it was simply a debt that could have been readily paid. Therefore Knight would not have been wanting contracts to vacate tax sales until they had become irredeemable. Any one having any knowledge of tax sales would know that before they became irredeemable they were simply debts—very dangerous debts, it is true, but yet only debts. It appears from the testimony of Webb (Rec. p. 348) that the next day he went down to the tax office and found that Knight's statement to him was true.

(*d*) *Webb's consequent interview with Mrs. Kennedy.* Thereupon Webb communicated the situation to Mrs. Kennedy, telling her what her legal rights were, and submitted the matter to her determination. Before receiving her answer he went to New York. Upon his return he received the letter, already printed (Rec. p. 308), and containing this sentence:

> "You say I must not receive the rent, which he will probably send to me by mail on Tuesday morning, but I do not see how I can refuse it, unless I know when I am to get another tenant."

Thereupon Webb went to see Cohen and had the conversation with him narrated by Webb (Rec. p. 286) and by Cohen (Rec. pp. 384–387). The substance of this interview was that Webb asked Cohen if his client, the Kanns, would be still willing to take the property in question at an advance of $1,200 a year. Upon Cohen's inquiry, Webb informed him that the Kings had allowed the property to be sold for taxes, and that the sale had become irredeemable, and that Mrs. Kennedy proposed to forfeit the lease by reason of such fact.

The sequence of events here would appear to be very simple and natural, and the events themselves strictly legal. Webb learned from Knight, whose information he verified at the appropriate office, that a tax sale had occurred and had become irredeemable. Under the covenants of the lease this operated as a forfeiture of the term. He advised his client as to the legal right which she had to avail herself of this forfeiture. She hesitated to do so until she knew that she could get a new tenant. Webb, in order to answer this question, immediately set himself to work to procure, if he could, a new and a more advantageous tenant. He naturally went to see the Kanns, whose interest it was to acquire the premises, and who had offered to give what he considered a satisfactory price for it.

Down to this point any criticism of either his acts or those of Mrs. Kennedy can not be made from a legal standpoint. We can understand that if Mrs. Kennedy desired to do a friendly act to the Kings she would have informed them of the forfeiture and would have given them an opportunity of redeeming it. But it is not necessary to say that we are not concerned with other than legal relations, and any criticism which in a court of law or equity is based upon an assertion that litigants have failed in friendship or in generosity or in charity is unjustifiable because irrevelant. The rule, "Do unto others as you would that they should do unto you," is not a legal rule. The rule of the law is rather expressed by the maxim "*caveat emptor.*" Counsel who assume so lofty a standard can not justify themselves in the endeavor to control legal relationships and legal principles by exciting prejudices which some may naturally feel when they contemplate what they consider ungenerous and uncharitable conduct on the part of others. We, therefore, confidently assert that no legal criticism, no competent criticism in a court of justice, can be made of either Mrs. Kennedy or Webb or the Kanns, because the Kanns were willing to take, and Webb and Mrs. Kennedy were willing to give, the result of a forfeiture which the Kings had unfortunately incurred through what abundantly appears to be mere gross negligence.

The point, however, which is apparently a matter of astonishment to counsel for the Kings, is that Webb not only told Cohen that there was a tax sale, but that it was irredeemable. Upon this point there was a characteristic and utterly irrelevant cross-examination of the defendant Webb. As has been said, the relevant fact in connection with a tax sale, so far as third persons are concerned, is that it is no longer redeemable. The very fact that Webb was proposing a forfeiture of the Kings' lease, and the giving of a new lease to the Kanns, was in

itself information to Cohen that the tax sale was irredeemable. If he needed further information on the subject, he could have obtained it at the office of the recorder of deeds, at the municipal offices, or at the office of any real estate title company. As has been seen, he already knew from Kann that Knight had been to see the Kanns about the sale, independently of any information given him by Webb. In point of fact, he did exactly as Webb had done, and proceeded to a proper office to verify Knight's information. Webb went, as has been seen, to the District offices. Cohen went, as he describes at great length, to the office of the District Title Insurance Company, and it appears from his testimony (Rec. pp. 362–366), as well as from the testimony of Mr. Newton, president of said company (Rec. pp. 443–447), that he did there verify the statements of Knight and of Webb. Referring to record, page 444, it seems that Mr. Cohen found upon the books of Mr. Newton's company information that the lot in question had been sold to C. H. Wiltsie on the 9th of May, 1889 (*should be April 13, 1899*). And Cohen further says that Newton advised him that the sale was a valid one, although Newton says that Cohen rather overestimated his answer (Rec. p. 447).

Webb himself says (Rec. p. 313): "I gave Mr. Cohen no information that was not on the public records of the District of Columbia." The attempt, therefore, to convict Webb of giving information to Cohen which he could not have otherwise gotten is not ingenuous.

(*c*) *Cohen's determination to buy the tax title in question.*

It appears from the testimony of Cohen (Rec. p. 360) that after Mr. Webb left his office he communicated with his clients by telephone, and learned from them that they were willing to give $300 a month for the property and pay taxes, provided that possession was given to them,

and that their offer should not be used as a means of compelling King to pay a higher rent. The meaning of this last sentence is obvious (Rec. p. 384), although it was attempted to be twisted, upon the cross-examination of Webb, into a strained and unintended signification (Rec. p. 354).

Thereupon Cohen called at Webb's office at about 1 o'clock of the same day and told Webb what his clients had authorized him to do. Webb informed him that Wiltsie lived at Rochester, whereupon Cohen said to Webb: "Well, Webb, why don't you buy that tax certificate yourself?" To which Webb replied: "There is no necessity for that." Cohen answered: "Well, I believe I will buy it." Webb said: "Oh, no; don't do that. I wish you would not complicate the matter." Webb further said that Mrs. Kennedy was going to put the Kings out for failing to pay taxes; that she had determined to forfeit the lease, and that he, Webb, had advised her to return the rent if tendered. Cohen then proceeds to give, at page 361, a statement as to his forming a purpose, after he had seen Webb for the second time on the day in question, to himself buy the tax certificate and hold it for the Kanns. His first step was to pay the visit to the District Title Insurance office, to which reference has already been made above, and to get the information there detailed. He then got authority from the Kanns to go to Rochester and buy the title from Wiltsie. He communicated with a member of the bar, John Ridout (Rec. pp. 367, 441), and asked him Wiltsie's address in Rochester, New York, and got some general information from him with respect to the character of the man. Thereupon he returned to Webb's private residence, at about 6 o'clock that same evening (Rec. pp. 364–5). He told Webb that he was going to Rochester that night to buy the tax certificate, and that thereafter they must deal at arm's length. Webb replied to him: "Oh, Cohen, I

wish you would not do that; I don't know about that." To which Cohen answered: "Well, I do." Webb then said: "You know I mentioned the fact of this tax title to you myself." To which Cohen replied, telling Webb that, as he (Cohen) had informed Webb that morning, he (Cohen) had first heard of the tax sale through Mr. Kann, who had been told of it by Mr. Knight, who, in turn, had informed Mr. Webb. It is thus seen that the information upon which Mr. Cohen acted was derived first from the books of the title company, and, secondly, from information received from Mr. Ridout.

The action of Webb, which is here most seriously criticised, is that he failed to buy the tax title, although Cohen had warned him that he was going himself to Rochester to buy it from Wiltsie, and that he and Webb would have to deal at arm's length.

Before considering this criticism in detail, it may be well to say here that in the opinion of counsel for Webb, as soon as he learned that Mrs. Kennedy's tenants had, against their covenant, allowed her property to be sold for taxes and the tax sale to become irredeemable, it was his very clear duty to advise his client that she could not safely allow the lease to continue; that although it was true that the particular tax title might be defective, and, therefore, innocuous, yet another default might be made, another tax sale might ensue, and that tax sale might be valid. The negligence of the tenants in this important respect demonstrated conclusively that they were dangerous, and that she could not, with a prudent regard for her own interests, allow them to continue as tenants any longer than was absolutely necessary to forfeit the lease and eject them. Counsel would have further advised her from their conviction as to the law then in force that there was no rule of law or equity which could prevent her from enforcing such forfeiture, provided she had done nothing to bring the forfeiture about, so as to estop herself from enforcing it.

Counsel would have further advised her that, inasmuch as the tax sale had already become irredeemable, it could make very little difference to her who held the same; that if it was invalid it could be legally so adjudicated against any one holder quite as well as against another; that if, on the other hand, it was valid, then the terms upon which she could purchase it, if she could purchase it at all, would have to depend upon agreement between the adverse holder and herself; that in the then situation, it being uncertain whether the tax sale was valid or invalid, if she could by a compromise with the holder of the title get rid of litigation over it, it would be a prudent and beneficial thing to do. Further, in the then uncertainty as to validity, if she was reasonably certain of securing an advantageous lease from the Kanns, it would be better for her interests to have the tax title held by them, even though they declared that they would deal with her at arm's length about it than to leave it in the hands of an unknown person, as Wiltsie then was to Webb, who might sell it or who might bring an ejectment upon it. In other words, counsel take the position that were it in fact true (as the evidence shows it is not), that Webb persuaded Cohen to buy this tax title, it would still be an absolutely irrelevant fact in this controversy.

Counsel should further have advised Webb that it would be expedient to enforce the forfeiture before dealing with the question of the tax title; that even had Mrs. Kennedy been in a position to herself purchase it, she should not under the circumstances do it, inasmuch as a claim might have been made by the tenant that through such action she had intended to condone the forfeiture. The present counsel, however, were not consulted by Webb until a later date and phase of the case. While they can understand that the persons beneficially interested in Mrs. Kennedy's estate may criticise Webb's

action and the advice that counsel would have given him, they can not understand the right of the Kings or of their counsel to call into question his action in not himself buying this tax title. The assertion on their part that their landlord is to be blamed because a tax title which had become adverse by their default was not, at any sacrifice or inconvenience, bought in to remedy the consequences of their negligence, is, in the view of counsel for Webb, audacious in the extreme. This, however, is not the point which we are discussing. The charge in the letter of counsel for the tenants and in their bill remains of record and is sustained by the Court of Appeals. This amounts, disclaim it as one may, to a charge and a finding that Webb is testifying falsely when he says that he had nothing whatever to do with the purchase of the tax title in question by Cohen; and that Cohen is testifying falsely when he says, as he does again and again, but explicitly on page 361 of the record, as follows:

> Q. After Mr. Webb told you not to buy the tax certificate did you tell him whether you would or not?
>
> A. I didn't make any reply, when he said to me, "Don't do that," or "don't add that complication," or words to that effect; for my own remark that I might buy it was made in a jocose way at the time.
>
> Q. I will ask you to state whether or not you intended to buy it when you made that remark to him jocosely?
>
> A. I had no intention whatsoever of buying it.
>
> Q. I wish you would state now whether, up to that time, any person whomsoever had suggested to you that you buy it?
>
> A. No, sir.
>
> Q. State whether or not any person, at any time, advised or suggested that you buy it?
>
> A. No, sir.

In this connection counsel for Webb desire again to

refer to the letter of Messrs. Darlington and Tobriner, dated November 1, 1901, and especially to this language on page 90:

> "That Mrs. Kennedy, or her representative, stood by acquiescing, by inaction if not affirmatively, in the purchase of the tax deed to her property, without protecting her in any way from the loss of her property through the said transaction, and that this was done well knowing at the time that the slightest intimation to Mrs. King of the proposed purchase of the tax certificate would have led to instant protection against such a contingency."

If English language has force, it was certainly intended to be charged by these words that the danger to Mrs. Kennedy's property resulted not from the holding of an adverse tax certificate by Wiltsie, but from the charged fact that Webb permitted Cohen to purchase what was already an irredeemable tax sale certificate from Wiltsie, a stranger to Webb. This can not be regarded, in view of the facts, as an ingenuous charge.

Mr. Webb has, however (Rec. p. 96), frankly stated what the reasons for his conduct in this regard were. In his affidavit (and this is referred to not so much as testimony, although, as has been said, counsel for the Kings cross-examined upon portions of these affidavits, but as illustrating Webb's reasons for pursuing the line of conduct he did), he says:

> "To this declaration of said Cohen of his purpose to purchase the tax-sale certificate affiant replied, 'I don't know about that,' indicating his dissent from said Cohen's proposition, to which said Cohen replied, 'Well, I do.' To which affiant replied, 'I am sorry to hear it, but I see no way of preventing you.' And thereupon the said Cohen departed. Said Cohen did not disclose his purpose in seeking to acquire the said tax sale certificate, nor did he make any

other statement with regard thereto than as above quoted. It did not occur to affiant at the time that there was, nor does affiant now know of, any reason which made it of any consequence to his client who should be the owner of said tax sale certificate, so long as it was not owned and controlled by affiant's client. Affiant considered that the said tax sale certificate, if valid, would be equally valid in the hands of any holder; and that, if invalid, it could be set aside when owned by Cohen as readily as if owned by Wiltsie. Had it occurred to affiant that it would be more injurious to his client's interests for Cohen to own said tax sale certificate than for Wiltsie to own it, affiant was powerless to prevent said Cohen's action. Affiant did not know Wiltsie's address in Rochester, nor did he know what amount Wiltsie would demand for the sale of said certificate; and at that hour it was impossible for affiant to have obtained the money necessary to go on to Rochester and attempt to compete with said Cohen for the purchase of said tax sale certificate. Affiant did not then understand, nor does he now understand, that he owed any duty in the premises to the complainant; and he did not then know, nor did he discover until long after the tax deed conveying said property to said Cohen had been executed and recorded, that the complainant had had an option from Wiltsie to purchase said tax sale certificate since the 25th of July, 1901, and had failed to do so. Affiant did not then know, and did not discover until long after the execution of said tax deed to said Cohen, that the said tax sale certificate was then and had been since the 25th day of September in the Central National Bank, of this city, subject to the complainant's purchase, and that it remained there until after the close of banking hours on the 1st day of October, which affiant has since learned to be the fact. Affiant never at any time entered into any agreement, understanding, or arrangement, express or tacit, or of any sort whatsoever, as to the purchase of said tax sale

certificate, or the use which was to be made of the same when purchased by said Cohen; and every averment, suggestion, intimation, and insinuation in the bill of complaint to that effect is an unmitigated falsehood and is devoid of any foundation."

The substance of these averments of his affidavit the witness Webb repeated again and again in his examination and cross-examinations (see record, pp. 313, 317).

At page 329 the witness is asked by Mr. Darlington the following questions:

Q. And even the suggestion of Mr. Cohen to you that you ought to get that outstanding cloud against your client's title did not strike you with any more force than that?

A. No; I did not intend to buy it at that time. Of course I intended to attend to it when I was ready to do so.

Q. Then when Mr. Cohen told you he was going to buy it on the same day, why was it, if you intended to attend to it sometime, you didn't take it up before Mr. Cohen got it?

Mr. PERRY: I object to this, because the witness has repeatedly answered why he did it.

A. I can only answer that as I did before, that I did not regard the tax title in Mr. Cohen's hands as any more dangerous than it was in Wiltsie's hands.

Q. You tell us now that when Mr. Cohen suggested to you to buy up this outstanding lien you said it was not necessary, and that you did intend to attend to it later. If you did intend to attend to it later, why was it, when you had notice that Mr. Cohen was going to buy it up adversely to your client and hold it at arms' length, you did not then take it up?

A. I can only answer in the same way as I did before, that I did not regard the tax title in Mr. Cohen's hands as any more dangerous than in the hands of Mr. Wiltsie.

Q. And although he told you he was going to but it up from Wiltsie and hold it adversely to you?

A. *It was already held adversely to me.*

Again, Webb says (pp. 331, 332):

A. I am not contesting that tax title in this case. I am testing the forfeiture of the lease, and, as I say, when I wish I will take up that question of the tax title with the person who owns it and defend my estate at that time and at my own instance and option.

In paragraph 15 of his answer Webb avers as follows:

"15. Answering the fifteenth paragraph of said bill, this defendant is advised and believes and therefore avers that he can not be compelled to litigate the question of the validity of said tax sale in this proceeding at the instance of the complainant, and that whether valid or invalid, this defendant has the right to deal with the same without reference to the views of the complainant, and to extinguish said tax title in such manner as in his judgment may be best. That this defendant can, without litigation and without expense, secure a release of said tax title and he is advised and believes that it is his duty to the parties in interest to obtain the extinguishment of said tax title by amicable compromise, without imperiling the fee-simple title to said property by litigation over a question of the validity of the same, which, if determined in favor of the validity of said tax sale, will forever extinguish the title of all parties to said property except the defendants Kann. This defendant has not been able to inform himself sufficiently as to the facts and the law to be able to say whether the said tax sale is valid or not, but he is advised and believes and therefore avers that under the statute the said tax deed is made *prima facie* evidence of the regularity of all proceedings for the sale of said property, and that in a litigation affecting the

validity of said sale, the burden would be cast upon this defendant to establish this invalidity, and he denies the right of the complainant to compel this defendant to enter upon such litigation and take the consequences of the result thereof solely for the benefit of the complainant, through whose default, and only through whose default, the said tax title has arisen."

The further proceedings of Cohen after he left Webb upon his doorstep upon the evening of the 30th of September, 1901, are immaterial so far as Webb is concerned. They are given in detail in the testimony, beginning at page 361. They concern only Cohen and the Kanns and Wiltsie, as to the last of whom it appears from the record that he is a person who invests money by the hundred thousand dollars in buying delinquent tax titles in order that he may get 15 per centum per annum upon his money, and, in addition, such sums as he can extort from persons who desire to redeem tax sales.

It is sufficient to say that Cohen procured the return of the certificate from the Washington bank and himself bought it of Wiltsie for $500. He immediately returned to Washington, and on Thursday, October 3, procured a deed for the property. Cohen says explicitly (Rec. p. 370) that he did not see Mrs. Kennedy between the 19th of September and the 3d of October, and that he did not see Webb or any one representing either Mrs. Kennedy or Webb between the evening of the 30th of September and the 3d of October; nor had he communicated with any such person or persons between those days.

Cohen further says, upon the same page, that he did not see Webb until Tuesday, the 8th of October, and does not think that he had communicated with him.

Just in this connection we refer to Exhibit C, filed with the original bill (Rec. p. 20), which contains Mrs. Kennedy's notice to the tenant that she declines to re-

ceive further rent from her, and refers her to her attorney, Webb, for further explanation of her (Mrs. Kennedy's) action in the matter.

From this it will appear that so early as the 1st of October Mrs. Kennedy was taking active steps to forfeit the lease. In fact, on October 4, 1901, she in person signed the regular notice to quit (Rec. p. 440). By some error this notice is dated 1903, but Mrs. Kennedy died in 1901.

A consideration of what occurred thereafter seems to counsel absolutely irrelevant; but inasmuch as one of the reasons for their writing this detailed brief is to reply to the attacks which have been made upon their client, they will briefly consider what happened subsequently to the writing of this letter of Mrs. Kennedy's of October 1.

It appears from the testimony of Cohen (Rec. p. 370) that when he did see Webb, on the 8th of October, he was told by Webb that he (Webb) was considering making a new lease with Mrs. King of the property which she then occupied. It appears from Mr. Webb's testimony (Rec. p. 291) that on the 3d of October Mr. Tobriner called to see him in behalf of Mrs. King, and that sundry negotiations ensued between him (Tobriner) and a Mr. Cahill, also representing the tenant, who called to see Mr. Webb in that capacity on the 5th day of October. Both Tobriner and Cahill wanted to know whether or not the landlord would make a new lease with the Kings.

The next thing that occurred (Rec. p. 291) was that on the 9th of October, Cohen, with his counsel, Mr. W. G. Johnson, came into Webb's office and informed him that the tax certificate was owned by the Kanns, and that they would not surrender it. But Mr. Johnson said that if Webb would get rid of the present tenants and lease the property to them, they would take a lease of $300 a

month and surrender the tax certificate; or, if Webb refused, that they would hold it in hostility to his client, and possibly bring ejectment proceedings against her (Rec. p. 292).

On page 316 Webb says, in this connection:

> A. As I say, this matter was brought to my attention so suddenly that I did not think of the matter afterwards. I did not know Mr. Cohen's object in purchasing this tax title, and I did not ascertain it until Mr. Johnson informed me on the 9th day of October, 1901.

Subsequently a meeting occurred at Dr. Fry's office, to which Mr. Darlington refers in the following question (Rec. p. 319):

> Q. Do you remember one morning, at Dr. Fry's office, about 9 o'clock, you and Mr. Cohen and Mr. Johnson were there, and this same statement (as to the Kanns' then position) was made then?
>
> A. Yes, sir; I think I was.
>
> Q. Did you communicate this threat, as you call it, to Mrs. Kennedy?
>
> A. I had spoken about it to Mrs. Kennedy previously to that.
>
> Q. Please tell us, as nearly as you can, what you told her?
>
> A. I can not give the words.
>
> Q. Give it in substance?
>
> A. The substance is just what I said; that the Kanns had purchased this tax title and offered to surrender it if we would turn over the property to them and take them as tenants.
>
> Q. And that if you would not?
>
> A. If we would not, they would hold it adversely and she must take the consequences.

Prior to this meeting at Dr. Fry's office, and after the 9th of October, Mrs. Kennedy had, in consequence of Dr. Fry's advice, determined to disregard the advice of her counsel, Webb, and to condone the forfeiture and fight

the tax title. In accordance with this, Webb's letter of compromise of October 30, 1901 (Rec. pp. 87–89), was written.

In consequence of the refusal of this offer of compromise, both Dr. Fry and Mr. Webb advised Mrs. Kennedy that her proper course was to enforce the forfeiture and adhere to the compromise of October 9th with the Kanns, which compromise involved the surrender of the tax title, and this was done. The details of what has been so briefly stated will be found, also, in Mr. Cohen's testimony (Rec. pp. 370, 374; also pp. 408, 415).

Acting upon this advice, Mrs. Kennedy, on the 9th day of November, 1901, subscribed and swore to the complaint necessary under the landlord and tenant law to recover possession of her premises (Rec. p. 24); and on the same day (Rec. p. 25) the legal summons was issued against the tenant. These later proceedings may be summed up as follows:

On the 1st of October, Mrs. Kennedy determined, upon the advice of her counsel, Webb, to forfeit the lease, and then notified the tenant to that effect. Thereafter, apparently at the instance of the Kings, she wavered, and at one time had determined to condone the forfeiture and fight the tax title. Thereupon the Kanns, insisting upon their right to a lease upon what they understood to be the agreement with Mr. Webb, notified her that if she did not fulfil that agreement they would assert their tax title against her. In consequence of this notification the compromise with the Kanns of October 9 was made. Subsequently Dr. Fry intervened and the compromise letter of Webb (October 30) was written. Later, this last attempted compromise being rejected by the Kings, Mrs. Kennedy determined, upon the advice of both Dr. Fry and her attorney, Mr. Webb, to forfeit the lease; and proceedings to that effect were instituted. Counsel for Webb confidently claim that no just criticism can be

made against him for his conduct in the matter from its inception to its conclusion.

(f) Webb's motives in advising Mrs. Kennedy to forfeit lease.

Attention is called at the outset to the fact that in so far as Webb knew of Mrs. Kennedy's personal desires, they were to terminate the lease in question (Rec. pp. 317, 351, 352, 354). At page 351 he says explicitly: "One of the principal covenants in the lease had not been kept and I knew that she (Mrs. Kennedy) was anxious to get rid of this lease on account of the term it had to run." Again, at page 354, Webb says explicitly that Mrs. Kennedy was anxious to get rid of this lease. At pages 309, 317, and 355 questions were asked Mr. Webb upon cross-examination implying that, while in his correspondence he was referring to the Kings as dangerous tenants, and, therefore, was anxious to get rid of them, yet in point of fact it was a mere matter of dollars and cents, and he would have been willing to keep them if they had paid more rent. In answer to this it must be said explicitly that Webb's motives for his advice are irrelevant. It was decided by the House of Lords in the case of *Allen* v. *Flood* (1898, A. C. 1), that even where a man maliciously persuades another to leave the employment of a third person, no cause of action arises therefrom against the persuader. It is further said that malice can not convert into an actionable that which is otherwise an unactionable thing.

In so far as the criticism is concerned, it is fair to say that Webb has nowhere said that he would have been willing to advise any new lease to the Kings which would remit to their diligence the payment of taxes on the property. He would have made a new lease with them for a shorter term and for an increased rental. He would not have been willing to entrust the safety of his client's

INSERT.

Additional Authorities on Immateriality of Lessor's Motive in Declaring Forfeiture.

The plaintiff, with the object of bringing about the bankruptcy of the defendant, a codirector, and of having him thereby disqualified and removed from the directorate, took an absolute assignment from the defendant's creditors, with a covenant that the amount of the debts recovered, less costs, should be paid over to the assignors; and notice of the assignment was given to the defendant. Held, that the plaintiff may maintain an action against the defendant for the debts so assigned.

Fitzroy *vs.* Cave, L. T. R., 499 (Eng., C. A., June 9, 1905).

Although the question how far a defendant's motive should determine his liability for causing damage to a plaintiff is involved in much conflict, the courts are harmonious in holding that even the most reprehensible motive does not make him liable for causing the plaintiff to suffer the consequences of the latter's own breach of duty.

See 18 Harv. L. Rev., 411, 412.

Thus, the most vindictive motive does not give rise to a cause of action for ejecting a trespasser or for collecting a debt.

Brothers *vs.* Morris, 49 Vt., 430.
South Royalton Bank *vs.* Suffolk Bank, 27 Vt., 505.

Neither can the motive for suing a trespasser or a debtor furnish a defense to the action.

Jacobson *vs.* Van Boening, 48 Neb., 80.
Bragg *vs.* Raymond, 11 Cush. (Mass.), 274.

And even where the plaintiff, with evil motive, procures an assignment of a mortgage to foreclose it, or becomes a shareholder in order to enjoin a corporation, paramount public policy requires that the court should look at the cause of action alone.

Morris *vs.* Tuthill, 72 N. Y., 575.
Bloxam *vs.* Metropolitan Ry. Co., L. R., 3 Ch., 337, 353.

There is no hardship in compelling a defendant to discharge his obligation, but there is grave danger in permitting him to plead the motive of every creditor who seeks to enforce it.

Additional Authority in Waiver.

Times Co. *vs.* Siebright, 15 Phila., 235.
S. C., 11 W. N. C., 283.

property to them. In his correspondence he has laid the greatest stress upon the defects of the tenants which were brought prominently into view by the forfeiture; that this in any way impeaches his good faith can not fairly be claimed.

(g) Webb is criticised because it is said that he did not give the Kings "another chance" with a new lease (Rec. pp. 309, 355).

The testimony, as hereinbefore referred to, shows that after the 4th of October, when the notice to quit was sent, Webb was considering with Cahill the making of a new lease to the Kings—in other words, the giving of another chance, as counsel for the Kings put it, to the Kings (Rec. pp. 291, 317, 325, 332, 349, 352, 353, 370, 373).

The compromise letter of Webb of October 30, 1901, so frequently hereinbefore referred to, was another such chance (Rec. p. 355).

Counsel for Webb only refer to this in connection with the implied reflections upon his character. That any duty, either legal or moral, rested upon him to give the Kings another chance is denied.

It would, indeed, be most unusual for a landlord, under the circumstances in question, to have any other thought than that of depriving the defaulting tenant of another chance to injure his landlord's property.

(h) Webb is criticised (Rec. p. 310) for relying upon the general statement made by Cohen on September 30, to the effect that the Kanns were willing to renew their offer of some months earlier to take a lease of the premises in controversy.

It is submitted that this criticism is strained. Webb says (Rec. p. 350), in answer to the question:

> "Q. When you went to see Mr. Cohen you went to learn whether you could get this new tenant?

> A. I wanted to be certain, before I advised Mrs. Kennedy definitely to forfeit the lease, that she was in a position to get another tenant."

Again he says, on page 354, "I wanted to be certain I could get a tenant." At page 310 he says that he knew the offer of the Kanns was not binding unless it was accepted. Bearing in mind the fact that the Kanns had some months earlier approached Webb and made the offer in question, he had advised her to forfeit the existing lease on the faith of this offer of the Kanns. The details of the new lease were left for future contract. In our large cities among business and professional men statements of this kind are constantly acted upon and are enforced at law when necessary.

(*i*) *Webb is again criticised in connection with his testimony that he saw no way to prevent Cohen from going to Rochester and purchasing the tax title.*

Just what this criticism means counsel do not understand. In connection with the questions asked Cohen (Rec. p. 359) and the statements made by him with respect to *injunction* and *ne exeat*, counsel for Webb must assume that counsel for the Kings have in mind some litigation that Webb or the Kings might have invoked to prevent the purchase by the Kanns of the tax title in question. If this be meant, the position is an extraordinary one. By the law of the land property is sold for the non-payment of taxes and a certificate is issued to the purchaser at the tax sale. Such purchaser has a legal right to this certificate and to the interest in the real estate given thereby. He can sell it or refuse to sell it. Any third person can by agreement with him purchase it from him. If the Kanns or Cohen or any other person desired to purchase this certificate they had unquestionably a right to do so. That any court by any

writ could have prevented this under the circumstances is inconceivable. Criticism of Webb, therefore, can hardly be based upon his failure to institute litigation against Cohen. If, on the other hand, it be merely meant to criticise Webb because he did not himself go to Rochester or communicate with Wiltsie, by telegraph or otherwise, then the answer to this criticism has been already hereinbefore mades both in the words of Webb and of his counsel.

(*j*) *Webb is criticised because after the 9th of October he cooperated with the Kanns.*

It appears from the record (p. 326) that on the 9th day of October what has been called the "compromise offer of the Kanns" was accepted by Mrs. Kennedy. By this acceptance the tax title was gotten out of the way (Rec. pp. 357, 432). Thereafter Webb consistently acted with the Kanns and their counsel save when he was interrupted by the attempted compromise with the Kings expressed in his letter of October 30, so often hereinbefore referred to. This will be apparent from the testimony at pages 322, 327, 373, 418 of the record.

(*k*) *It may be said that after the compromise with the Kanns on October 9, Webb was writing to the Kings' counsel as if he still thought the tax title a thing of danger.*

In reply it is only necessary to say that Webb did not even then know what action Mrs. Kennedy would finally take. In fact, on October 30, he sent, at her direction, the offer of compromise to the Kings, which would have superseded the Kann compromise and left the tax title to be reckoned with.

We repeat that all of this criticism from the mouth of a defaulting tenant is impertinent, save as an attack on Webb's credibility as a witness.

Allegations of Duress and Threats.

Beginning at page 318, there is a cross-examination continued for pages with respect to alleged threats which induced Mrs. Kennedy to determine to enforce the forfeiture. It appeared indisputably from the testimony that when Mrs. Kennedy, upon the advice of Dr. Fry, had concluded to disregard the advice of her counsel, the defendant Webb, and to condone the forfeiture, the defendants Kann, through their counsel, had stated to her counsel that in that event she would have to fight their tax title. The situation thus presented to Mrs. Kennedy was the choice between two evils. She would either condone the forfeiture and keep, at the same insufficient rental, a tenant who had allowed her property to be sold for taxes and an adverse deed to be acquired, and thus not only lose the Kanns as tenants (who would, upon becoming such tenants at an increased rent, release to her the adverse tax deed), but also have to fight the validity of the tax deed upon her property; or she would accept the Kanns as tenants at the said higher rental, have released to her the adverse tax title and enforce the forfeiture against the Kings, and thus encounter litigation on their part for the remission of said forfeiture.

It would have been just as unreasonable for the Kanns, in case she had determined in favor of the Kings, to say that they had coerced her by threats, as it is for the Kings to say that the Kanns coerced her by threats. Nothing can be plainer than this. Threats, in the meaning of the law, are not the proposal to an interested party of two different lines of action, each of which has advantages or disadvantages, and the insistence by the advocates of each upon his proffered line of action, but the forcing upon a person against his will and interest of

a line of action which is adopted only by reason of the threat, and not by reason of superior advantage to the person to whom it is proposed.

In conclusion, upon this charge of fraud, counsel regret to say that they are unable to understand the foundation upon which counsel for the appellee rest it. Nor can they any more understand why the case of *Michoud et al.* vs. *Girod et al.*, 4 Howard, 554, should be cited in this connection.

Did the lessor have a right to redeem her property from this tax sale? Surely. If she did not choose to redeem it, had she a right to neglect it? Surely. If Cohen determined to buy it, was she under any obligation to interfere? Surely not.

The charge of fraud must resolve itself into these charges:

1. The lessee had a right to redeem.

But under the law she had not.

2. The defendants, Webb, Cohen, and the Kanns conspired to prevent this redemption by Webb's procuring Cohen to buy the tax title.

But this is denied, and not only not proved, but not attempted to be proved, and is, moreover, disproved by the testimony.

But even if it were proved as conclusively as it has been disproved, the fatal gap in the reasoning would recur. The lessor had no right to redeem, and hence a conspiracy to hinder her in that regard would be irrelevant.

But even had she a right to redeem, no legal harm would have been done to her by any such conspiracy; for there can be no conspiracy to do a legal act by legal means.

She had made no contract with Wiltsie, and he was free to sell to any one.

Cohen was free to buy.

Webb was free to buy in the lessor's interest.

If Webb could have persuaded the Kanns to buy the tax title from Wiltsie, and release it to the lessor in consideration of a satisfactory lease to them, what principle of law would have been violated? Where would have been the necessary elements of an illegal conspiracy?

Here was no combination to do an illegal thing, and none for the use of illegal means to do anything.

Question ten must, it is urged, be answered in the negative.

This tenth question is revelant to the fifth, sixth, and eighth assignments of error.

QUESTION XI.

Has Not the Complainant Been Guilty of Such Laches as Disentitle Her to Relief?

The complainant has shown herself guilty of such *laches* in the specific matter in controversy that a court of equity will not relieve her.

1. She has been guilty of *laches* in not ascertaining and discharging her duty to pay the taxes upon the rear portions of the demised premises.

2. She has been guilty of *laches* in failing to pay the taxes accruing upon "sublot A" from December, 1897, to July, 1900, although these taxes accrued annually and occasionally semi-annually during those years.

3. She has been guilty of *laches* in not at once redeeming the premises from tax sale when she had an opportunity so to do.

4. She has been guilty of *laches* in failing to purchase an adverse tax title when during the period of more than eight weeks she had an opportunity of so doing.

These propositions have necessarily been considered in the preceding pages of this argument, and what has been said on these points need not be here repeated. The lessee has clearly been guilty of each and all of these *laches*. This question concerns the seventh assignment of error.

QUESTION XII.

In Any Case Can a Defaulting Tenant Have Relief From a Forfeiture Save on the Condition of Paying All Costs and Reasonable Counsel Fees to the Landlord Incurred in Resisting Such Relief?

The court below erred on the question of costs. In any view of the case, the plaintiff should pay not only the taxed costs, but such costs as the appellant, Webb, has been put to in the retainer and compensation of counsel, payment of stenographers' bills, printing of briefs, and other similar necessary expenses. This is required upon principle, and was explicitly provided for as a condition of relief in the following case relied upon by counsel for the complainant in the court below.

Eichenlaub v. *Neil*, 3 Ohio Dec., 365.

> "The court below decreed that forfeiture be relieved against upon payment of all accrued and unpaid rents and interest thereon, all the costs of the suit and also of the suit before the justice of the peace, and attorney's fees in the sum of $300 to the lessor's attorneys, and such a decree may be drawn, the costs on appeal to be paid by Neil and interest to be computed to the date of the decree below."

This point covers the ninth assignment of error.

If in any case this doctrine should be applied it is in such a case as this. One main point of this litigation is the validity of a tax title. The lower court has at the instance of a defaulting tenant tied the lessor's hands

and deprived her of the power to save herself from the peril in which the lessee has negligently put her. It has gone further and has permitted the lessee to litigate the validity of that tax title at the lessor's peril.

If the lessee gains the cause, the lessor has a dangerous and unreliable tenant on her hands for the balance of the term.

If the lessee fail, then the lessor has lost her property and has only the security of the bond (Rec. pp. 107, 108) to rely on for her indemnity. The penalty of this bond is only $40,000, and the property is said in the testimony of Webb to be worth more than twice that amount. If a man should in any case use every effort to save himself by the retainer of counsel and an appeal to the courts of justice, surely this is such a case. The person whose admitted negligence has caused such expense should in any case make it good.

In conclusion, we respectfully submit that to give relief in the case at bar is to do violence to the law.

As Chief Baron Thompson said in *Bracebridge* v. *Buckley* (*supra*):

> "*It really comes to a question whether in all cases of reentry on breach of covenant a court of equity will do away with the covenant.*"

As Lord Campbell said in *Duke of Beaufort* v. *Neeld* (*supra*):

> "*It would be a disgrace to the law if there could have been such a decision.*"

As Lord Justice Smith said in *Eastern Telegraph Co.* v. *Dent* (*supra*):

> "*I could not bring myself to say that a judge could run his pen through that part of the contract, which is that consent should be asked for, and render it of no effect.*"

As Lord Justice Ray said in *Barrows* v. *Isaacs* (*supra*):

> *"It is impossible not to see that such relief would be an incentive to negligence. If we were to grant it, hereafter lessees might avoid looking at their leases, lest they should be reminded by them of obligations which it would be more convenient to ignore."*

It is respectfully submitted that the decree of the Court of Appeals of the District of Columbia should be reversed on every assignment of error.

R. ROSS PERRY,
R. ROSS PERRY, JR.,
E. S. THEALL,
Counsel for Appellant Webb.

APPENDIX A.

Extract From Platt on Leases, Vol. 2, p. 475.

2. As to relief at law and in equity from forfeiture occasioned by non-payment of rent.

Forfeitures for non-payment of rent have always been regarded unfavorably; indeed so little countenance have they received, that even courts of law, at an early period, assumed the power of relieving the lessee, by staying proceedings in ejectment at any time before execution executed, on payment of the arrears of rent due and all costs (*i*), and, in some cases, on his giving security for future payments (*k*): But the act of the 4th of George the Second abridged their powers in this respect, by providing (*l*), "that if the tenant or tenants, his, her, or their assignee or assignees, do or shall at any time before the trial in such ejectment pay or tender to the lessor or landlord, his executors or administrators, or his, her, or their attorney in that cause, or pay into the court where the same cause is depending, all the rent and arrears, together with the costs, then and in such case all further proceedings on the said ejectment shall cease, and be discontinued."

(*i*) Downes *vs.* Turner, 1 Salk. 597; Goodtitle *vs.* Holdfast, 2 Stra. 900; Philips *vs.* Dolittle, 3 Mod. 345; Duckworth dem. Tubley *vs.* Tunstall, Barnes, 184; Anon. 1 Wils. 75; Archer dem. Hankey *vs.* Snapp, Andr. 341; Roe dem. West *vs.* Davis, 7 East, 363–6; Doe dem. Harris *vs.* Masters, 2 Barn. & Cres. 490; S. C. 4 Dow. & Ry. 45; Pure dem. Withers *vs.* Sturdy, Bull. N. P. 97, 7th edit.; Swanston *vs.* Biggs, 1 Beat. 170; Lovat *vs.* Lord Ranelagh, 3 Ves. & B. 24.

(*k*) Smith *vs.* Parks, 10 Mod. 383.

(*l*) 4 Geo. 2, c. 28, s. 4; 2 Man. & Selw. 531.

The act contains also a provision (*m*), that nothing therein contained shall extend to bar the right of any mortgagee of such lease, who shall not be in possession, so as within six calendar months after such judgment obtained, and execution executed, he pay all rent in arrear, and all costs and damages, and perform all the covenants and agreements which on the part of the first lessee ought to be performed.

An under-lessee is entitled to stay proceedings in ejectment on payment of rent and costs under this act (*n*).

In the case of Goodright *vs.* Noright (*o*), a motion under the statute for setting aside the proceedings in an ejectment with costs was granted, though opposed by the lessor on the ground of his having given instructions to his attorney to bring the action before the tender of the rent.

But the court has refused to relieve after a trial, for that, they said, would be but to exercise the function of legislation instead of judicial construction and to depart from the line which the statute had drawn (*p*); the principle of which determination has received the approbation of succeeding judges (*q*).

The Court of Common Pleas lately refused a motion to stay proceedings in an ejectment for forfeiture for non-payment of rent, made on the ground that an ejectment between the same parties was pending in the Queen's Bench, for an alleged forfeiture for non-payment of rent previously due, as the one action would not necessarily decide the other (*r*).

(*m*) Latter part of sect. 2 of 4 Geo. 2, c. 28; Doe dem. Whitfield *vs.* Roe, 3 Taunt. 402.

(*n*) Doe dem. Wyatt *vs.* Byron, 1 Man. Gra. & Sc. 623; S. C. 3 Dowl. & Lown. 31.

(*o*) Goodright dem. Stevenson *vs.* Noright, 2 W. Blac. 746.

(*p*) Roe dem. West *vs.* Davis, 7 East, 363-6.

(*q*) Doe dem. Harris *vs.* Masters, 2 Barn. & Cres. 490-3; S. C. 4 Dow. & Ry. 45.

(*r*) Doe dem. Henry *vs.* Gustard, 2 Dowl. Pr. Ca. N. S. 615; S. C. 5 Scott's N. R. 818; 4 Man. & Gra. 987.

The application of the statute can not be objected to on the ground of the ejectment being brought for a forfeiture for not repairing, as well as for non-payment of rent. In such cases, the court will stay proceeding as to the rent, on its being paid with costs, and leave the plaintiff to proceed on any other title (*s*).

But a court of common law has no jurisdiction to stay proceedings upon terms, without the consent of the lessor, where the action of ejectment is founded on a forfeiture occasioned only by a breach of covenant to repair (*t*).

Previously to the statute in question, a wider range was taken by courts of equity, where it was usual to relieve the tenant from the forfeiture, on payment of the rent, interests, and costs, whatever interval might have elapsed between the accrual of the debt and the day of payment (*u*). The principle of this supposed equity, that interest and costs sufficiently compensated the landlord for the delay (*x*), has been frequently condemned (*y*): and the injustice of the practice becoming daily more evident, the legislature interposed, and, while it recognized the jurisdiction of equity (*z*), remedied the evil, not by giv-

---

(*s*) Pure dem. Withers *vs.* Sturdy, Bull. N. P. 97, 7th edit. And see Anon. 1 Wils. 75. Wadman *vs.* Calcraft. 10 Ves. 69.

(*t*) Doe dem. Mayhew *vs.* Asby, 10 Adol. & Ell. 71; S. C. 2 Per. & Dav. 302.

(*u*) Doe dem Hitchins *vs.* Lewis, 1 Burr. 619. And see Webber *vs.* Smith, 2 Vern. 103; S. C. 1 Eq. Ca. Ab. 115, pl. 14. Hill *vs.* Barclay, 18 Ves. 60. Doe dem. Earl of Jersey *vs.* Smith, 7 Pri. 326; S. C. as in note (*y*), p 493 of Vol. 1, ante, Bowser *vs* Colby, 1 Hare, 109, 125.

(*x*) De Scarlett *vs.* Dennett, 9 Mod. 22. Lovat *vs.* Lord Ranelagh, 3 Ves. & B. 30. And see the cases in the following note (*y*).

(*y*) Hill *vs.* Barclay, 16 Ves. 405; 18 Ves. 58–9; 60–1. Reynolds *vs.* Pitt, 19 Ves. 140. See also Sparks *vs* Liverpool Water Works Company, 13 Ves. 434. Newman *vs.* Rodgers, 4 Bro. C. C. 393; and Bracebridge *vs.* Buckley, 2 Pri. 2?6.

(*z*) Wadman *vs* Calcraft, 10 Ves. 70. Davis *vs.* West, 12 Ves 475–6. Hill *vs.* Barclay 18 Ves. 60.

ing any relief *in specie* (*a*); but merely by limiting the period within which an application might be made, and thus removing the uncertainty to which the landlord had before been exposed from the tenant's privilege of offering compensation at any time, in order to found an application for equitable aid (*b*).

The statute in question, the 4th Geo. 2, c. 28, already quoted, after reciting (*c*) that it often happened that after a reentry made, the lessee or his assignee, upon one or more bills filed in a court of equity, not only held out the lessor or landlord by an injunction from recovering the possession, but likewise pending the suit ran much more in arrear, without giving any security for the rents due when the said reentry was made, or which should afterwards incur, enacted that in case the lessee or lessees, his, her, or their, assignee or assignees, or other person or persons claiming or deriving under the said leases, should permit or suffer judgment to be had and recovered on such ejectment, and execution to be executed thereon, without paying the rent and arrears, together with full costs, and without filing any bill or bills for relief in equity within six calendar months after such execution executed, then and in such case the said lessee or lessees his, her, or their assignee or assignees, and all other persons claiming and deriving under the said lease, should be barred and foreclosed from all relief or remedy in law or equity, other than by writ of error for reversal of such judgment, in case the same should be erroneous, and that the said landlord or lessor should from thenceforth hold the said demised premises discharged from such lease.

The third section of the same statute enacted, that in case the said lessee or lessees, his, her, or their assignee

(*a*) Wadman *vs.* Calcraft, 10 Ves. 70.
(*b*) Doe dem. Hitchings *vs.* Lewis, 1 Burr. 619.
(*c*) 4 Geo. 2, c. 28. s 2.

or assignees, or other person or persons claiming any right, title, or interest, in law or equity, of, in, or to the said lease, should, within the time aforesaid, file one or more bill or bills for relief in any court of equity, such person or persons should not have or continue any injunction against the proceedings at law on such ejectment, unless he, she, or they should, within forty days next, after a full and perfect answer should be filed by lessor or lessors of the plaintiff in such ejectment, bring into court, and lodge with the proper officer, such sum and sums of money as the lessor or lessors of the plaintiff in the said ejectment should in his or their answer swear to be due and in arrear, over and above all just allowances, and also the costs taxed in the said suit, there to remain till the hearing of the cause, or to be paid out to the lessor or landlord, on good security, subject to the decree of the court; and that in case such bill or bills should be filed within the time aforesaid, and after execution should be executed, the lessor or lessors of the plaintiff should be accountable only for so much and no more as he, she, or they should really and bona fide, without fraud, deceit, or willful neglect, make of the demised premises from the time of his, her, or their entering into the actual possession thereof; and that if what should be so made by the lessor or lessors of the plaintiff should happen to be less than the rent reserved on the said lease, then the said lessee or lessees, his, her, or their assignee or assignees, before he, she, or they should be restored to his, her, or their possession or possessions, should pay such lessor or lessors, or landlord or landlords, what the money so by them made should fall short of the reserved rent for the time such lessor or lessors of the plaintiff, landlord or landlords, should hold the said lands.

To entitle himself to relief in equity from a forfeiture occasioned by non-payment of rent, it is not necessary

that the failure in payment should arise from accident, as the miscarriage of a letter with a remittance, insolvency, or disease; but even in cases of negligence, the tenant being solvent, and not prevented by any accidental circumstance, equity will interefere; and, upon payment of the rent and all expenses, will prevent the tenant's being turned out of possession; considering that, in the one case, frequently great hardship might be the consequence; while, in the other, the lessor being placed in the same situation, there is in general no hardship (*d*).

The necessity, however, for paying into court the arrears of rent and the costs arises only where the tenant applies for an injunction by which his possession is to be continued, and the landlord restrained from proceeding with his ejectment. In these cases, if the injunction be granted, the court is bound to impose the particular terms required by the statute for the security of the landlord; but if the landlord be actually in possession, undisturbed by the interposition of the court, and the tenant's first application for relief be made at the hearing of the cause, the statute does not apply (*e*).

In equity, as at law (*f*), the court refuses to connect the right of the tenant to redeem under the statute for non-payment of rent, with any extrinsic matter of waste, or breach of covenant, so as to make the tenant pay compensation for them, as a condition connected with his relief (*g*). Relief will be granted against forfeiture for non-payment of rent, without prejudice to any remedies at law or in equity to which the landlord may be entitled to resort on other accounts. But if breaches of covenants, for which the lessee might be ejected, and

(*d*) Per Lord Erskine; Sanders *vs* Pope, 12 Ves. 282–9. But see as to this principle, ante, p. 477 of this volume.

(*e*) Bowser *vs*. Colby, 1 Hare, 109.

(*f*) Ante, p. 477 of this volume.

(*g*) Davis *vs*. West, 12 Ves. 475. Swanston *vs*. Biggs, 1 Beat. 170.

against which the court could not relieve, be proved, it will not relieve against a breach for non-payment (*h*).

And where, on a trial in ejectment, the lessor was confined by the judge to the proof of one breach of covenant, against which, it seems, equity would have afforded relief, although he was capable of proving other breaches against which no relief could be had, the court refused to continue an injunction against further proceedings under the ejectment (*i*).

Where a lessee suffered judgment by default in an ejectment on a proviso for reentry on non-performance of covenants, without requiring a particular of the breaches on which the lessor intended to rely, and afterwards applied for relief in equity on payment of arrears of rent and costs, and the lessor by his answer alleged that the ejectment was brought for breaches of other covenants, such as to repair, not to assign without license, etc., Sir William Grant decreed that the defendant should be at liberty to bring an ejectment for breach of any of the covenants, except the covenant for payment of rent, reserving further directions; but on the cause coming before Lord Eldon on appeal, his lordship said that the decree was not right in form, for if the court thought it stood also upon the other breaches, and meant to examine them, the course ought to have been of a different nature; an issue to try whether there were any breaches of those covenants, specifying them, that were known to the defendant previously to the ejectment brought (*k*).

But, according to Sir James Wigram, V. C. (*l*), it de-

(*h*) Bowser *vs.* Colby, 1 Hare, 109, 134. Home *vs.* Thompson, Sau. & Scul. 615.

(*i*) Lovat & Lord Ranelagh, 3 Ves. & B. 24.

(*k*) Wadman *vs.* Calcraft, 10 Ves. 67. And see Davis *vs.* West, 12 Ves. 475; S. C. Roe dem. West, *vs.* Davis, 7 East. 363.

(*l*) Bowser *vs.* Colby, 1 Hare, 109, 132.

pends very much, in these cases, on the form and course which the pleadings take, whether the breaches of covenant are to be proved in the cause or tried in an issue.

And the same learned judge also admitted that a case might exist in which a lessee should have also dealt with the property of his landlord, or otherwise so acted as to deprive himself of all right to equitable interference in redeeming his lease, forfeited by non-payment of rent, although no covenant other than that for the payment of rent might have been broken (*m*). At the same time, he disclaimed the proposition that a court of equity was to exercise a merely arbitrary discretion upon this subject, or that the equitable considerations which should deprive the plaintiffs in the cause before him of their right to redeem their testator's lease, must not be such as were capable of being defined, or, at least reduced to a principle (*n*).

Equity will relieve a lessee against a forfeiture of his lease for non-payment of rent, as well where the lease is declared to be void as where a right of reentry is given to the lessor on that event (*o*).

An under-tenant of premises comprised in an ejectment for non-payment of rent brought by the first lessor, may obtain the same relief as his lessor, by filing a bill in equity against such first lessor within six months after execution had, and making the deposits prescribed by the act (*p*).

So, if there be many under-lessees of distinct parts of

(*m*) Bowser *vs.* Colby, 1 Hare, 109, 138.

(*n*) Ibid.

(*o*) Bowser *vs.* Colby, 1 Hare, 109. And see ante, p. 327 et seq. of this volume.

(*p*) Berney *vs.* Moore, 2 Ridgew. P. C. 310. See also O'Reilly *vs.* Fetherston, 4 Bli. P. C. N. S. 161. The language of the Irish Act, 11 Anne, c. 2, is similar to that of the English act, 4 Geo. 2, c. 28. And see Doe dem. Wyatt *vs.* Byron, 1 Man. Gra. & Sc. 623; S. C. 3 Dowl. & Lown. 31.

premises, the original lease of which becomes forfeited for non-payment of rent, any of them may obtain relief, by paying the whole rent, and may compel a contribution from the other under-lessees (*q*).

Where a mesne lessor forfeited his lease for non-payment of rent, and afterwards took a new lease from his lessor, he might compel his under-lessee to accept a new lease from him, for so much of the term of the latter as was unexpired, with the same covenants as were in the old lease (*r*). But the necessity which it would seem formerly existed (*s*) for the grant of a new lease to the tenant on his obtaining relief, was obviated by the 4th section of the act of George the Second (*t*), which provided, that if the lessee, his executors, administrators, or assigns, should upon such bill, filed as aforesaid, be relieved in equity, he or they should have, hold, and enjoy the demised lands according to the lease thereof made without any new lease.

3. As to relief in equity from forfeiture for breach by the lessee of other covenants than for payment of rent.

Whether the relief granted by the courts of equity against forfeiture for breach of covenant for payment of rent should be extended to other covenants, and if so extended, to what covenants it should apply, have been subjects of frequent consideration. Some of the questions have been disposed of with very little difficulty, while others have undergone repeated discussion before the point could be regarded as settled.

It was laid down by Lord Alvanley, then Sir R. P. Arden, M. R. (*u*), as a principle in administering this species of relief; and succeeding equity judges have

(*q*) Webber *vs.* Smith, 2 Vern. 103; S. C. 1 Eq Ca. Ab. 115, pl. 14.

(*r*) Baker *vs.* Olibeare, Freem Ch. 92.

(*s*) Hack *vs* Leonard, 9 Mod. 90. Anon. Freem. Ch. 115, case 129. Baker *vs.* Olibeare, Freem. Ch 92 Bowen *vs.* Whitmore, Freem. Ch. 192.

(*t*) 4 Geo. 2, c. 28, s. 4, 19 Ves. 141.

(*u*) Eaton *vs.* Lyon, 3 Ves. 692-3.

recorded their approbation of the rule (*x*), that if by unavoidable accident, fraud, surprise, or ignorance not willful, a party was prevented from executing his covenant literally, a court of equity would interfere; and, upon compensation being made, would give relief; signifying by the term *compensation*, not uncertain damages to be recovered through the medium of a jury; but a compensation to be estimated and measured by some certain standard of computation, such as interest on a sum of money (*y*).

On this principle, it has been determined that a tenant whose conduct with reference to his covenant has been gross and ruinous has no pretense to relief (*z*). Nor has a tenant who, in violation of his covenant, willfully omits to insure the premises demised (*a*); though he may have expended considerable sums in improvements (*b*); and it is immaterial whether the neglect to insure has been of long or short duration, for in neither case can the court estimate the quantum of risk in damages (*c*).

In like manner, he has no claim to relief, if, in contravention of his covenant, he assign or underlet without consent (*d*). He can not show that by the assignment the

(*x*) See Hill *vs.* Barclay, 16 Ves. 402; S. C. 18 Ves. 56. Rolfe *vs.* Harris, 2 Pri. 206, n. Bracebridge *vs.* Buckley, 2 Pri. 215. And see particularly cases of relief against neglect to apply for a renewal, ante, vol. 1, p. 751.

(*y*) Sanders *vs.* Pope, 12 Ves. 291, 292, cites Wafer *vs.* Mocato, 9 Mod 112. Reynolds vs. Pitt, 19 Ves. 142; S. C. 2 Pri. 212, n. But see Bowen *vs.* Whitmore, Freem. Ch. 192.

(*z*) Hill *vs.* Barclay, 16 Ves. 404; 18 Ves. 62-3. Bracebridge *vs.* Buckley, 2 Pri. 224-5.

(*a*) Rolfe *vs.* Harris, 2 Pri. 206, n. Reynolds *vs.* Pitt. 212, n. S. C. 19 Ves. 134. Bracebridge *vs.* Buckley, 2 Pri. 218.

(*b*) White *vs.* Warner, 2 Meriv. 459. Green *vs.* Bridges, 4 Sim. 96.

(*c*) Cases sup.

(*d*) Wafer *vs.* Mocato, 9 Mod. 112; Wadman *vs.* Calcraft, 10 Ves. 67; Hill *vs.* Barclay, 18 Ves 63; Lovatt *vs.* Lord Ranelagh, 3 Ves. & B. 31; Bracebridge *vs.* Buckley, 2 Pri. 200, 221. And see Northcote *vs.* Duke, Ambl, 511; S. C. 2 Eden, 319; Davies *vs.* Moreton, 2 Ch. Ca. 127.

lessor sustains no damage; that, on the contrary, he, the lessee, is a beggar, who can not pay the rent, and the assignee a solvent tenant, and that the lessor is, therefore, in a better condition, having two persons answerable to him instead of one. The answer is, that the court can not estimate the damage. The fact, as it is alleged, may be true at the moment, but the consideration, whether the lessor is to gain or lose by having a tenant put upon him, must run through the whole continuance of the lease. It is sufficient that the lessor insists upon his covenant, and no one has a right to put him in a different situation (*e*).

Relief has also been refused where the lessee carried on a trade prohibited by the covenant (*f*). So, again, where he suffered a way to be used over the demised lands contrary to his covenant, although he offered compensation in damages. The breach, said Sir Joseph Jekyll, can not be estimated in damages. It tends to the prejudice of the inheritance, as it may hereafter amount to an evidence for a prescription over the close (*g*).

It seems that the court will relieve upon a breach of covenant to cultivate a farm in a particular way, provided the injury arising from it be inconsiderable (*h*).

And in an early case (*i*), the lessee was relieved from a forfeiture occasioned by his cutting down great trees, and a reference was directed to the master to ascertain the amount of damage, though it may well be questioned whether relief would now be afforded under similar circumstances.

The right to relief from forfeiture occasioned by omission to repair has not been settled so easily, as will ap-

(*e*) Per Lord Eldon, 18 Ves. 63.

(*f*) Macher *vs.* The Foundling Hospital, 1 Ves. & B. 188.

(*g*) Descarlett *vs.* Dennett, 9 Mod. 22; approved of in Sanders *vs.* Pope, 12 Ves. 291; and in Bracebridge *vs.* Buckley, 2 Pri. 221.

(*h*) Lovat *vs.* Lord Ranelagh, 3 Ves. & B. 24. See particularly p. 30.

(*i*) Bowen *vs.* Whitmore, Freem. Ch. 192.

pear from the number and *conflicting nature of the* cases on the point. Covenants relating to repairs are of two kinds, first, those by which the lessee engages generally to repair, and keep in repair, the premises during the term; and, secondly, those by which he engages to lay out a stipulated sum on repairs within a given time. We will examine these two kinds separately, to ascertain whether there is any difference between them, so far as the interposition of equity is concerned.

As to the first kind:

That equity would interpose in favor of the lessee about a century and a half ago is proved by the case of Webber *vs.* Smith (*k*), where a lessee for years at a certain rent, and under covenants to repair, made a hundred under-leases; and the premises not being repaired, nor the rent paid, a reentry was made, and the original lease avoided. Six of the under-lessees were plaintiffs against the head landlord and first lessee. The court said that they could not make any decree to apportion the head landlord's rents, nor relieve the plaintiffs, but on their payment of the whole rent in arrear, and repairing all the premises; but that having so done, they might compel the rest of the under-tenants to contribute.

Parker, C., also relieved a lessee from a forfeiture occasioned by non-repairing, observing that he could not apprehend what damage the administrator of the lessor could sustain if the lessee suffered the buildings to be out of repair, so as he kept the main timber from being rotten and left all in good repair before the end of the term. It was, therefore, referred to a master to see what damage, if any, was done for non-performance of covenants, and at what time, etc (*l*).

Sanders *vs.* Pope (*m*) is the only other instance of a

(*k*) Webber *vs.* Smith, 2 Vern. 103; S. C. 1 Eq. Ca. Ab. 115, pl. 14.

(*l*) Hack *vs.* Leonard, 9 Mod. 90.

(*m*) Sanders *vs.* Pope, 12 Ves. 282. And see Davis *vs.* West, 12 Ves. 475.

forfeiture for not repairing being deemed a subject for equitable relief. The point, it is true, arose on a covenant to lay out a specific sum on repairs within a given time; but it is not difficult to glean from Lord Erskine's judgment that his opinion was in favor of relief, though he thought that such a case might be one of very complicated consideration and much detail as to what would put the party in the same situation (*n*). He dissented from Lord Alvanley's limited rule in Eaton *vs.* Lyon (*o*); and declared, that if the covenant were broken with the consciousness that it was broken, if it were willful, not by surprise, accident, or ignorance, still if it were a case where full compensation could be made (and he considered it could be made on a breach of covenant to repair), the authorities said, not that it was imperative upon the court to give relief, but that there was a discretion (*p*). But he did not hold that under all circumstances a tenant would be justified in neglecting to repair, and applying to equity as of course, offering to put the landlord in the same situation; on the contrary, he thought that, if any vexation appeared, the court might refuse to interfere (*q*).

The authority of these decisions, however, has been repeatedly impugned, as we shall find by an examination and comparison of the other cases on the subject.

With regard to Webber *vs.* Smith (*r*), Lord Eldon said, that though both reports represented the relief to be upon undertaking to do the repairs, yet he was not informed how the relief was actually to be given, nor what became of it; that probably nothing more was

(*n*) 12 Ves. 290.
(*o*) Ante, p 483 of this volume.
(*p*) 12 Ves 292-3.
(*q*) Radcliffe *vs.* Warrington, 12 Ves. 334.
(*r*) Ante, p. 485 of this volume.

done (*s*); and Baron Richards declares that he could not understand the case (*t*).

Hack *vs.* Leonard (*u*), too, has been disapproved of by Lord Eldon, who denominated it a loose note (*x*); and by Baron Richards, who said that he could not see the ground of the decision (*y*).

Nor has Sanders *vs.* Pope escaped condemnation. In the earlier case of Wadman *vs.* Calcraft (*z*), Lord Eldon and Sir Wm. Grant, M. R., evidently took for granted, as a general position, that no relief could be afforded against a forfeiture for not repairing. But soon after Lord Erskine's decision, the case of Hill *vs.* Barclay (*a*) arose, where the tenant had covenanted to lay out £150 within a given time; to keep the premises in repair and leave them in repair at the end of the term; that it should be lawful for the lessor twice a year to enter and survey the premises, and to require the necessary repairs to be done within three calendar months; and a right of reentry was reserved on breach of any of the covenants. It appeared also (*b*) that the lessor had called for the repairs to be done within three months, by which (it may be noticed) he dispensed with his right of entry under the general covenant (*c*). The tenant neglected to repair until the ejectment was brought, and, under these circumstances, Lord Eldon refused to relieve him from the consequences of his default. When the case first came before the court, he inclined to think that considerable arguments might be urged against the relief given in

(*s*) Hill *vs.* Barclay, 16 Ves. 406

(*t*) Bracebridge *vs.* Buckley, 2 Price, 215.

(*u*) Ante, p. 485 of this volume.

(*x*) In Hill *vs.* Barclay, 18 Ves. 61.

(*y*) Bracebridge *vs.* Buckley, 2 Price, 215.

(*z*) Wadman *vs.* Calcraft, 10 Ves. 67. And see 16 Ves. 403.

(*a*) Hill *vs.* Barclay, 16 Ves. 402; S. C. 18 Ves. 56. And see Hannam *vs.* South London Water Works Company, 2 Meriv. 61–67.

(*b*) 18 Ves. 64.

(*c*) Doe dem. Morecraft *vs.* Meux, 4 Barn. & Cres. 606.

Sanders *vs.* Pope, but upon its coming on for judgment, on a motion to dissolve the injunction, he considered that it was not governed by that case, and distinguished it by the circumstance of the dealing by request and refusal between the lessor and lessee, which, in Sanders *vs.* Pope, had not occurred in the period during which, by the express covenant, the money ought to have been applied (*d*).

The Vice Chancellor (Sir Thomas Plumer) in Rolfe *vs.* Harris (*e*) has entered his protest against Lord Erskine's decision, saying that it was founded rather on dicta than authorities, and went further than the authorities warranted; while Baron Richards has declared that it did not give satisfaction to Westminster Hall (*f*). On the other hand, it is right to mention that Baron Wood, in the last case cited, noticed the determination in terms of unmingled praise.

Under these circumstances, we may perhaps safely conclude that it is no longer an authority that equity will relieve in general cases of breaches of covenants to repair.

One of the grounds of Lord Erskine's judgment (*g*), and which had been previously adopted by Parker, C., in Hack *vs.* Leonard (*h*), that if the premises, under a covenant always to be kept good, were repaired at the close of the term, the landlord would have his property in better condition from their not being repaired sooner, was strongly animadverted on by Lord Eldon (*i*), who said that the court was surely not authorized so to deal with contracts; and that it was taking a prodigious liberty with a contract by which the tenant had under-

(*d*) 18 Ves. 59. And see 16 Ves. 406.
(*e*) Rolfe *vs.* Harris, 2 Pri. 206, n.
(*f*) Bracebridge *vs.* Buckley, 2 Pri. 219.
(*g*) 12 Ves. 294.
(*h*) 9 Mod. 91.
(*i*) Hill *vs.* Barclay, 18 Ves. 62.

taken forthwith to repair, and to keep the premises in repair constantly, in order that the landlord might during the whole currency of the term have the property, if returned upon his hands, in exactly the state he intended; that if this doctrine could be maintained in general cases, what was to be said of the case, where, the court administering this species of equity, the tenant had become bankrupt before the end of the term, the assignees refused to take the lease, and the premises were thrown back to the lessor in a state of utter non-repair? Would that, said he, be anything like an execution of the contract? (*k*).

Secondly, comes the question, whether a covenant to lay out a specific sum in repairs within a limited time, is regarded with greater indulgence.

In the early case of Barker *vs.* Holder (*l*), the lessee covenanted to expend £200 on the premises within ten years, and, on failure, and after the expiration of thirty years the lessor brought an action on the covenant and recovered damages; but the court, although it admitted the hardship of the case, refused to relieve the lessee, either by mitigating the damages, or decreeing the amount to be laid out on the premises.

The covenant in the case of Sanders *vs.* Pope (*m*), so often referred to, was also of the like kind, viz, to lay out, before the end of the first five years of the term, the sum of £200 in substantially repairing and improving the premises; the lease also contained a proviso for re-entry on non-performance. Lord Erskine took express notice of the distinction between a general covenant to repair and a covenant to expend a certain sum in repairs within a definite time; and considered it (among

(*k*) And see a similar remark made by Richards, B., in Bracebridge *vs.* Buckley, 2 Pri. 218.

(*l*) Barker *vs.* Holder, 1 Vern. 316; S. C., 1 Eq. Ca. Ab. 28, pl. 5.

(*m*) Sanders *vs.* Pope, 12 Ves. 282.

other reasons) as furnishing particular ground for equitable interposition.

Though it is not altogether easy to collect from the report of Hill *vs.* Barclay what was Lord Eldon's opinion of the decision in Sanders *vs.* Pope under the peculiar circumstances of that case, some of his remarks being unfavorable to it (*n*), while others apparently acknowledged its propriety (*o*), still it is apprehended that the general tenor of the judgment indicates a disinclination on his lordship's part to allow to the lessee under the one covenant greater claims to relief than under the other. But the more recent determination in Bracebridge *vs.* Buckley (*p*), where all the previous authorities were reviewed, seems to set that point at rest. The case came before the Court of Exchequer on a bill by a tenant to be relieved from the forfeiture of his term incurred by a breach of covenant to lay out £1,000 in repairs within twelve months from the commencement of the demise; and, after great length of discussion, the bill was dismissed by Thomson, C. B., and Barons Graham and Richards, against the opinion of Baron Wood, principally on the ground that there were no means of ascertaining what compensation should be made to the landlord, or the mode of making it if ascertainable.

Sanders *vs.* Pope, therefore, seems to be overruled on this point also.

The distinction taken by Lord Eldon in his judgment in Hill *vs.* Barclay on the circumstance of notice or request and refusal, and before adverted to (*q*), being advanced by counsel, and urged as a ground for relief in Bracebridge *vs.* Buckley, the Chief Baron, supported by

(*n*) See Hill *vs.* Barclay, 16 Ves. 403.

(*o*) S. C., 18 Ves. 59. And Baron Wood's observations in Bracebridge *vs.* Buckley, 2 Pri. 234-5.

(*p*) Bracebridge *vs.* Buckley, 2 Pri. 200.

(*q*) Ante, p. 487 of this volume.

Baron Graham (*r*), said that, as the lessee in the former case had covenanted to make the necessary repairs within a certain time, no demand was necessary; and that a neglect of performance was tantamount to a refusal at law (*s*).

Whether notice was necessary in the case of a general covenant to repair, without any specification of time, was left untouched; but it may be mentioned that Sir Thomas Plumer (*t*) and Sir L. Shadwell (*u*) have severally expressed their opinion that no notice is necessary on a covenant to insure.

On the whole, it is submitted that relief against forfeitures incurred by breaches of covenants to repair, generally, or to lay out a specified sum in repairs within a certain time, will not be granted, unless the omission and consequent forfeiture be the effect of unavoidable accident, fraud, surprise, or ignorance not willful (*x*); or unless the landlord stand by and look on (*y*); or unless a refusal to interfere would, from a peculiar combination of circumstances, be attended with considerable hardship and injustice to the tenant. A case of the kind last mentioned occurred some few years since (*z*). The plaintiff, a lessee, with a right of perpetual renewal, and subject to a covenant to repair, and a proviso for reentry on non-performance, contracted with the Vauxhall Bridge Company for the sale of his interest in the premises, on receiving a notice from them to deliver up possession, which they were empowered by act of parliament to require for the purposes of the company. The lessors, the South London Water Works Company, were

(*r*) 2 Pri. 228.
(*s*) 2 Pri. 213, 230.
(*t*) Rolfe *vs.* Harris, 2 Pri. 206-9.
(*u*) Green *vs.* Bridges, 4 Sim. 96.
(*x*) Eaton *vs.* Lyon, 3 Ves. 692-3. Hill *vs.* Barclay, 18 Ves. 62.
(*y*) Hill *vs.* Barclay, sup.
(*z*) Hannam *vs.* South London Water Works Company, 2 Meriv. 61.

also negotiating for the sale of their reversion. Pending their treaty, the property was destroyed by fire; the landlords brought an action of ejectment, and the plaintiff filed his bill for an injunction. Under these circumstances, it was directed that execution should be stayed till further order, with a view to see if the parties could come to an agreement; and on the matter being again brought on, the court declared that, attending to the treaties, and to the provisions of a certain act of parliament therein mentioned, as they might affect those premises, and also to the possibility of the effect which the powers of the Vauxhall Bridge Company must have upon the plaintiff's strictly performing all the covenants in his lease, it was reasonable that the injunction should be granted; and, therefore, upon payment by the plaintiff to the defendants of their costs at law, it was agreed that an injunction should be awarded to restrain the defendants (the South London Water Works Company) from further proceeding in their action of ejectment, until the hearing or further order; the plaintiff paying his rent for the premises from time to time as it should become due, and undertaking to obey such orders as the court should think proper to make.

One more case remains to be noticed, where the court relieved the tenant of a lunatic's estate, on payment of all expenses, from an ejectment brought by the committee for not repairing, on the ground that it would be an administration in lunacy extremely prejudicial to the estates of lunatics if too hard measures were adopted with the tenants (*a*).

(*a*) Ex parte Vaughan; In the matter of Eldridge, 1 Turn. & Russ. 434.

APPENDIX B.

6 Ohio Decisions, Reprint, p. 556 (American Law Record, Vol. 8, p. 496).

FORFEITURE-PLEADING

SUPERIOR COURT OF CINCINNATI, SPECIAL TERM, 1880.

Force, Harmon, and Foraker, JJ.

BALDWIN *vs.* HENRY I. REES, ET AL.

1. A denial that the plaintiff "lawfully entered," or is in "lawful possession," or that the defendant "has committed any breach of covenant, so as to work a forfeiture," is not a traverse of any allegation of fact, but only a denial of the legal effect of alleged facts.
2. Lessee, after a perfected forfeiture, can not call for an account to inform him how much he has omitted to pay, in order to enable him to make a tender.
3. After forfeiture and reentry, for breach of covenant to pay taxes, equity will not relieve against such forfeiture.
4. If the lessor purchases a valid tax title to the leased land, so as to be seised of a different estate, yet if he makes peaceable entry and becomes fully possessed of the premises, his possession is lawful and entitled to protection.

FORCE J.: The petition avers that, in 1847, one Luther Rose leased to one Sidney Warner Pease, for ninety-nine years, renewable forever, certain described premises, in which lease it was covenanted that the lessee and his representatives would pay all taxes and assessments, and

in case of failure, the lessor or his representatives could enter and forfeit the lease and be repossessed of his former estate; that by various mesne conveyances the plaintiff became the owner of the reversion and of all the right and interest of the reversioner in the lease; that the defendant, Rees, became by assignment the owner of the leasehold, and as such went into possession; that taxes were not paid, and the land was sold by the auditor for such unpaid taxes; that the purchaser paid taxes for several years subsequently, and then sold and assigned his right to the plaintiff, who was then the owner of the reversion; that the auditor of the county, by tax deed, conveyed the premises to the plaintiff; that thereafter, the plaintiff, for breach of covenant, entered upon the premises, forfeited the lease, took possession of the entire premises, and has remained in quiet possession thereof ever since; that the various defendants deny his right and set up claims to interest in the premises; whereupon plaintiff prays to be quieted in his title and possession.

Defendant, John E. Rees, files an answer denying that the plaintiff lawfully entered or is in lawful possession; denying that the lessee or any of his assigns committed any breach of covenant so as to forfeit the lease, or did any act so as to forfeit the lease; averring that he does not know the amount of taxes unpaid, asking for an account so that he may tender the amount properly due, and to have relief against forfeiture, if any has accrued, and by way of cross-petition, claimed that he holds a mortgage upon the leasehold and praying for foreclosure. The defendants claim liens of various sorts upon the leasehold and file cross-petitions to have the leasehold sold to satisfy them.

Plaintiff demurs to Rees' answer and to the various cross-petitions.

It is clear that the denials are only denials of the legal effect claimed by the plaintiff as growing out of alleged facts; they traverse no allegations of fact, but only deny conclusions of law. They constitute no defense and are bad on demurrer.

The defendant is not entitled to an account of the amount of unpaid taxes to enable him to make a tender. The wrong done by omitting to pay taxes in violation of the covenant does not give a right to call for an account. It is his business to know.

But if the amount due on account of unpaid taxes were perfectly ascertained, defendant could not relieve the forfeiture by making tender of it. Non-payment of taxes is not like non-payment of rent; it puts in jeopardy the estate of the lessor, and equity does not relieve against a forfeiture efected for such a breach.

The fact that the estate of the lessee is encumbered does not affect the right of the lessor. By reentry upon forfeiture, the revisioner becomes seised and possessed of his former estate. The leasehold perishes, and incumbrances upon it, its feliage and fruit, perish with it.

It is true that no one can forfeit the lease but him who is seised of the estate of the lessor; and ownership by tax title obtained from the State after the State has forfeited for non-payment of taxes, is a different estate from that of the lessor. For the lien of the State for taxes rests not upon any estate, but, penetrating through all estates, rests upon the land itself, and hence the State, by a forfeiture, takes the land divested of all previous States. The State, when it subsequently conveys, creates a new fee simple, and confers a title free from all claim but thecontingency of the State's eminent domain.

But this does not affect the plaintiff's right to be quieted. If there was a valid forfeiture by the State and

conveyance to the plaintiff, while he could not then forfeit under the lease, for the lease and the estate of lessor and reversioner had gone out of existence, yet he is in possession under a clear title, against which the defendants have no claim. If the forfeiture for taxes and the tax title are invalid, then plaintiff purchased only a tax lien and was seised as lessor, and is in possession seised of his original estate. In either case he is entitled to the relief he demands.

The demurrer to the answer and cross-petition of Rees is sustained. For the same reason, the demurrer to the cross-petitions of the other defendants are sustained.

Yaple, Moos, and Pattison, for plaintiff.

Tilden, Buchwalter & Campbell, and Jordan, Jordan & Williams, for defendants.